SUPREME COURT, U.S.
FILED
SEP
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 264

**PAUL DE LUCIA,**
*Petitioner,*

v.

**UNITED STATES OF AMERICA.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# REPLY

**to Government Brief in Opposition**

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# INDEX.


| | PAGE |
|---|---|
| Argument | 1 |
| Conclusion | 125 |
| Constitutional privilege, value destroyed | 81 |
| Failure to testify, sanction applied | 101 |
| Federal Rules, pre-trial, abuse | 100 |
| Opinions below | 1 |
| Order of Court admitting petitioner | 75 |
| Reasons for detailed Reply | 61 |
| Res judicata, reply | 59 |
| Summary of Argument | 113 |


**NOTE**

**The Summary of Argument has been made to serve also as an index to much of the argument.**

PAGE

## Table of Cases

Anderson v. United States, 185 F. 2nd 343 ..... 109
Baghdasrian v. United States, 220 F. 2nd 677 ..... 71
Baumgartner v. United States, 322 U.S. 665 ..... 10
Beach v. United States, 46 Fed. 754 ..... 105
Bean v. Barber, 163 F. Supp. 111 ..... 99
Bilington v. Prudential Ins. Co., 254 F. 2nd 428 ..... 34
Bilokumsky v. Tod, 263 U.S. 449 ..... 99, 106
Brown v. Walker, 161 U.S. 591, 628 ..... 97
Commissioner v. Sunnen, 333 U.S. 591, 597 ..... 61
Costello ads United States, 16 F.R.D. 428, 222 F. 2nd 656; 350 U.S. 847 ..... 87
Cufari v. United States, 217 F. 2nd 404 ..... 51, 79
Daniel v. United States, 234 F. 2nd 102 ..... 110
Dooley Lumber Co. v. United States, 63 F. 2nd 384 ..... 9
Fink v. Reimer, 96 F. 2nd 217 ..... 35
Grabina ads United States, 119 F. 2nd 863 ..... 31
Great Lakes Co. v. Huffman, 319 U.S. 293, 295 ..... 83
Holland v. United States, 348 U.S. 121 ..... 82, 101
Isaacs v. United States, 256 F. 2nd 654 ..... 89
Iwanenko's Petition, In re, 145 F. Supp. 838 ..... 15
Jencks v. United States, 353 U.S. 657, 668 ..... 76
Johnson ads United States, 256 F. 2nd 849 ..... 6
Jow Gin, In re, 175 F. 2nd 299 ..... 72, 73

PAGE

Kent v. United States, 157 F. 2nd 1 ..... 109

Lehman v. Carson, 353 U.S. 685 ..... 31

Kessler ads United States, 213 F. 2nd 53 ..... 71

Kirby v. Tallmadge, 160 U.S. 379, 383 ..... 107

Klapprott v. United States, 328 U.S. 601 ..... 10

Knauer v. United States, 328 U.S. 654, 673 ..... 10, 60, 80

Landon v. Clarke, 139 F. Supp. 113; 239 F. 2nd 631 ..... 37, 41, 47

Liebowitz, In re, 49 F. Supp. 953 ..... 5, 39

Liebowitz ads Schlotfeldt, 94 F. 2nd 263 ..... 39

Fink v. Reimer, 90 F. 2nd 217 ..... 36

Mammoth Oil v. United States, 275 U.S. 13 ..... 102

Marino ads United States, 27 F. Supp. 155 ..... 35

McCaskill Co. v. United States, 216 U.S. 504, 517 ..... 7

Meli ads United States, 158 F. Supp. 217, 220 ..... 4

Minnerich ads United States, 250 F. 2nd 721 ..28, 45, 59, 71

Murra, Application of, 178 F. 2nd 670 ..... 71

Nashville Interurban Ry. v. Barnum, 212 F. 634 ..... 9

Nechman ads United States, 183 F. 788 ..... 66

Northern Ry. Co. v. Page, 274 U.S. 65 ..... 107

Nowak ads United States, 133 F. Supp. 191, 196, 355 U.S. 802 ..... 111

Oklahoma v. Texas, 272 U.S. 21, 42 ..... 83

Penn-Texas Corporation v. Morse, 242 F. 2nd 243 ..21, 74

PAGE

Pennock Oil Co. v. Roxana Petroleum Co., 289 F. 416 ..... 9

Penna R. Co. v. Chamberlain, 288 U.S. 333 ..... 4, 14

Pickford v. Talbott, 225 U.S. 651 ..... 19

Powers v. State, 75 Neb. 226 ..... 105

Perez ads United States, 29 F. Supp. 888 ..... 35

Roberson ads United States, 233 F. 2nd 517 ..... 109

Ruckle v. Burnham, 153 U.S. 216, 225 ..... 106

Schlotfeldt ads ex rel. Liebowitz ..... 10, 38

Schneiderman v. United States, 320 U.S. 118, 123 ..... 10, 60

Shapiro ads United States, 43 F. Supp. 928 ..... 34

Slochower v. Board of Education, 350 U.S. 551 ..... 98

Sternberg v. United States, 163 F. Supp. 590 ..... 99

Sumner ads Commissioner, 333 U.S. 591 ..... 61

Teamsters Local 167 of IB v. United States, 291 U.S. 293 ..... 105

Thomas v. Commissioner, 254 F. 2nd 233, 236 ..... 54

Throckmorton ads United States, 98 U.S. 61 ..... 60

Thurlow v. Commonwealth, 46 U.S. 504, 573 ..... 83

United States ex rel v. Schlotfeldt, 94 F. 2nd 263 ..... 38

Ussi v. Folsom, 254 F. 2nd 842 ..... 18

Vajtauer, ex rel v. Commissioner, 273 U.S. 103 ..... 106

Volpe v. Smith, 62 F. 2nd 808 ..... 40

Wilson ads United States, 221 U.S. 361, 392 ..... 97

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## to Government Brief in Opposition

### Reply Brief for the Petitioner

### Opinions Below

Since the filing of our Petition there has been published *United States* v. *De Lucia*, 256 F. 2nd 487, being the opinion of the Court of Appeals in the case at bar, *United States* v. *De Lucia*, 256 F. 2nd 493, being the opinion of the Court of Appeals in the related contempt case, and *United States* v. *De Lucia*, 163 F. Supp. 36, the opinion of the District Court in the case at bar.

*May it please the Court:*

This is a reply brief. In places where we fear that the Brief for the Opposition may have led Your Honors away from the real issues, we do our level best to point the way back to the record. Later in this brief we endeavor to explain why we deemed it necessary to reply and how it happens that so much detail is required. Of course it is possible for Your Honors to determine that certiorari should be granted after reading our petition together with the Government brief.* We have furnished a rather detailed Summary of Argument, herein p. 113, made to serve also as an index, in order that it may not be necessary to study all of this reply, except possibly on points made to appear questionable by that said here by our opponents. We appreciate that this Honorable Court has heavy burdens, at the same time, we have a duty.

The Attorneys for the Government have concluded that our petition should be denied. We proceed to examine the reasons stated.

## X.

**The record does not support the assertion here by the Government that De Lucia made a positive assertion that he had never been arrested.**

We quote from the Brief in Opposition (p. 10):

> "In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested."

Although we touched upon the matter of what may have been said concerning previous arrest in our brief (p. 54), we did not fully argue this point. We did not give the

* In our opening brief, p. 32, we quoted from **Schneiderman**, concerning a reversal for inadequate findings. Please also see **Johnson v. United States**, 256 F. 2nd 849, where the findings were deemed to be deficient that a new trial was held to be necessary.

matter a separate head, for the reason that the District Court shifted away from that portion of the Complaint (Vol. I, p. 5) which charges:

> "8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore, the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

Judge La Buy made no finding which mentioned a previous arrest or the issuance of a certificate of arrival.

The claim that petitioner made false statements concerning arrests has been coupled with the allegation that he used a false name in so many places that we consider the matter of false name under this head as we discuss the matter of arrest. In its opinion (Vol. I, p. 335) *United States v. De Lucia*, 163 F. Supp. 36, 41), the District Court said:

> "(2, 3,) The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him."

After Judge La Buy heard the evidence, the Trial Judge did not find that De Lucia made a positive false assertion that he had never been arrested. The obvious reason for this must have been that Judge La Buy realized that the Government produced no proof as to what De Lucia said, or did not say, to the officials. As we said in our opening brief (p. 48):

> "The evidence leaves a void as to what explanation De Lucia may have made to the officials who issued the papers and passed him into this country."

We respectfully submit that when Your Honors examine the Petition for Naturalization (Exhibit No. 1, Vol. II, p. 1), and find attached thereto a Certificate of Arrival. Such certificate should carry the weight of the positive, uncontradicted testimony of an unimpeached witness, if not more. The certificate, in the absence of any evidence to the contrary, established the fact of legal entry. This one fact precludes the inference made by Judge LaBuy. We quote the rule from *Penna R. Co.* v. *Chamberlain*, 288 U.S. 333, 340:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from the proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." (citing cases)

We quote further from our opening brief (p. 48):

> "The evidence leaves a void as to what explanation De Lucia gave the Examiner Durisch (Vol. I, p. 86). Mr. Durisch did not remember the conversation. He could tell from his marks on the Exhibits that the subject of the use of more than one name had been discussed. The same discussion may have taken place between McKay and De Lucia."

The record is void as to what explanation may have been given at this point. As was said by Judge Levin in *United States* v. *Meli*, 158 F. Supp. 217, 220:

> "'Hypothetical interpretations of nebulous symbols recorded twenty-eight years ago are not to be considered as clear, unequivocal, and convincing evidence which does not leave the issue in doubt.'"

Your Honors will find the answers made by petitioner as filled into blanks after questions put in the Preliminary Form, Exhibit 3 (Vol. I, p. 314; Vol. II, p. 33). We quote:

"24. Have you ever been arrested? No."

Your Honors will note that the questions put just before and immediately after this question specifically pertain to the conduct of the applicant in the United States. On the Face Brief, Exhibit No. 3 (Vol. II, p. 6) in the handwriting of Examiner Durisch there appears a notation as follows, "Arr. no." Mr. Durisch did not remember the incident but he described his usual practice custom and procedure. (Vol. I, p. 103)

The testimony leaves a void as to what explanation De Lucia may have given the Naturalization Judge. The courts below do not make it clear as to when De Lucia was required to explain. If the requirement was to the Immigration Service, there is no evidence that De Lucia did not explain.

The Attorneys for the Government in the case at bar (p. 8) assert that

> "It is established conclusively, by testimony and documentary evidence, that another man is in fact Paul Maglio."

The argument presented to Your Honors is that there can be only one Paul Maglio in this world, or that in some way it would be illegal for anyone else to use the name.*

In *In Re Liebowitz*, 49 F. Supp. 953, in holding that a person may lawfully change his name without legal proceedings the court said, p. 954:

> "And the fact that he took the name of another, even the name of his brother, does not change the rule."

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* We learn from **United States v. Menasche**, 348 U.S. 528, 535 concerning a declaration of intention that "the 1952 Act has rendered such declarations to tally meaningless as far as naturalization proceedings are concerned." In the case at bar, the only paper in evidence from the proceedings, bearing the name Maglio alone, without reference to De Lucia, is the declaration of intention filed in a state court.

A like argument is inferred by the Government Attorneys in opposition here, *i.e.*, there could be only one Felice De Lucia and that that one Felice De Lucia has a criminal record. We again quote from the Government Brief (p. 8):

> "The court found that petitioner was the 'Paul De Lucia' who had falsely assumed the identity of 'Paul Maglio' for purposes of entry and naturalization and that petitioner was in fact 'Felice De Lucia' who had a criminal record."

Judge La Buy did not find that Felice De Lucia, the petitioner, was the same Felice De Lucia who had a criminal record. The Government Attorneys in opposition here have apparently overlooked an important portion of our argument which we repeat from our brief (p. 50):

> "Judge La Buy concluded (Vol. I, p. 333):
>
> > 'The court is of the opinion that the foregoing evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person.'
>
> "Your Honors will please note that Judge La Buy refused to go any further than to find that the De Lucia on trial was in fact Felice De Lucia."

The Court of Appeals said, (p. 79, *United States* v. *De Lucia*, 256 F. 2nd 487, 490):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

The authorities have been collected in 5 C.J.S. § 1460 d. p. 642 to support a rule that the reviewing court is confined to the facts specifically found by the trial court.* But if

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* In **Johnson v. United States**, 256 F. 2nd 849 it was held that it was the duty of the trial court to deal adequately with and to distinguish with clarity what it finds as a fact and what it holds as conclusion of law, and it is not the duty or right of a reviewing court to make independent determinations.

this be treated as an equitable action, the appeal brought up the whole case, and the appellate court might pass on the record as to facts as well as the law. (§ 1462, p. 647) The rules are limited as follows (§ 1564[8] p. 1310:

> "A finding will not be implied where it would be clearly wrong to do so, as where it would be in contradiction of the record, or where the likelihood exists that to do so would thwart the intention of the trial court, * * * or where the court has expressly refused to find the particular fact. Further, the doctrine of implied findings will not be applied as to matters on which the court has made a direct finding, or a finding which precludes the inference, or where the fact is not fairly inferable from the facts found."

Your Honors have announced the rule concerning the duty of this Honorable Court to re-examine the record (Our opening brief, p. 30). In this reply we respectfully contend that there is no competent evidence in the record to support a finding by either court below that petitioner had been convicted of homicides in Italy prior to his coming to this country.

We quote further from our opening brief, p. 50:

> "Petitioner had a perfect right to sit by as the Government introduced a large number of exhibits, (Vol. II, pp. 12 to 43) intended to show that one Felice De Lucia had been convicted in Italy. This evidence at a future time during the trial may have been connected up by proof that the Felice De Lucia named in the foreign documents was in fact petitioner. This connection was not made. So the introduction of the foreign documents meant nothing. We quote from *McCaskill Co. v. United States*, 216 U.S. 504, 517:
>
> > 'In other words, if the testimony was not followed up by other testimony which was necessary to give it effect we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court.'

> "The District Judge in the case at bar must have noticed that the connecting evidence never came. Judge La Buy made no finding based upon the claim asserted by the Government that petitioner and Felice De Lucia named in the foreign documents were the same."

The Court of Appeals in its examination of the findings made by Judge LaBuy to determine what Judge LaBuy had in mind should have limited itself to the record. In the determination of the question, incompetent evidence should not be considered by the reviewing court. (§ 1564 [6] p. 1283). The only evidence to be found in the record concerning any conviction in Italy is to be found in the foreign documents. There is no evidence that the Felice De Lucia named in the foreign documents was in fact petitioner. So the documents should have been disregarded. Our point was also made to appear in our statement of the case as follows (p. 17):

> "At the trial the Government undertook to prove that petitioner had been arrested and convicted of a felony in Italy, before his entry into this country. The proof failed completely. Although the Government introduced a large number of documents (Vol. II, pp. 12-43) intended to show that one Felice De Lucia had been so convicted, no effort was made to prove the law of Italy or the jurisdiction of the foreign courts. No evidence was produced to show that the Felice De Lucia named in these foreign documents was in fact petitioner. Judge La Buy recognized this failure of proof and did not find that the Felice De Lucia named in the documents in fact was petitioner. Judge La Buy did find as a fact that petitioner was Felice De Lucia. This conclusion was reached by circumstantially comparing the proven pedigree of petitioner in this country and comparing it with a parallel pedigree of one Felice De Lucia in Italy, *i.e.*, his birth certificate, his Italian family history. But Judge La Buy did not attempt a further inference upon inference, in order to conclude that the Felice De Lucia

named in the so-called convictions was petitioner. The significance of the refusal of Judge La Buy to take this step was ignored by the Court of Appeals."

Now as we are seeking review in this Honorable Court, we find that the Government Attorneys have ignored the significance of the refusal on the part of the Trial Judge to make these findings.

Our opponents here have ignored the above quoted claim made in our opening brief. Also our opponents ignored the argument we made in our opening brief under the following head (p. 51):

**"The Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body."**

If this were an ordinary civil case the following rules would be applied.

> Where a refusal to find facts involves the weighing of evidence it is as conclusive on appeal as affirmative findings. *Pennok Oil Co. v. Rorana Petroleum Co.*, 289 F. 416; *Nashville Interurban Ry. v. Barnum*, 212 Fed. 634; *Dooley Lumber Co. v. United States*, 63 F. 2d 384.

In Volume 5 A, C.J.S. *Appeal and Error* § 1656, p. 480, the authorities are collected to support the following:

> "When the evidence on which the findings of the trial court are based is undisputed, the question of whether the evidence sustains or justifies the findings is generally regarded as a question of law open to consideration by the appellate court which is not bound by the findings under such circumstances."
>
> "While it is the province of the trial court to draw reasonable inferences from the facts established, the appellate court is not bound by the conclusions or inferences the trial court draws from the facts found." (p. 478)

The portion of our brief apparently overlooked by the Solicitor General is as follows: (p. 30)

> "After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your Honors will re-examine the record to determine if mistakes have been made."

As this re-examination is made by Your Honors, we respectfully submit that Your Honors should keep in mind that the absence of findings on the part of Judge La Buy has significance. The importance of this absence was given no heed by the Court of Appeals. Its meaning was not noticed by our opponents here.

In order for the Court of Appeals and our opponents here to support a finding that petitioner was in fact the Felice De Lucia named in the foreign documents relating to the conviction of one named Felice De Lucia, the foreign documents would have to be relied upon. There is no other evidence, competent or incompetent. Judge La Buy, not having made the finding, it can be assumed that Judge La Buy disregarded the foreign documents as hearsay. The authorities have been collected to support the following rule in 5 C.J.S. § 1564 [5] p. 1270:

> "In general, it will be presumed on appeal, where the case is tried by the court without a jury, that the court considered only proper and competent evidence in making its findings and did not consider other evidence which has been rejected or erroneously admitted, and it will be presumed that such rejected or erroneously admitted evidence, was disregarded. . . . "

As further evidence that the Government Attorneys here in opposition have failed to consider our point, we again quote from our brief (p. 18):

"Every time the courts below found a gap in the proof, the case was regarded as if petitioner were an alien resisting deportation, or an alien making application for citizenship. The burden in the courts below was placed upon petitioner. The courts below ignored the fact that the recitals to be found in the order for citizenship (Vol. II, p. 2) furnished a complete barrier to the theory upon which the revocation decree was founded. The decree was based upon the false assumption that the Naturalization Court depended entirely upon the recommendation of the Designated Examiner. There was no proof to support this theory. There was no proof to show that both the Designated Examiner and the Naturalization Judge did not know all that which was proved in this trial, concerning the qualifications of the petitioner for citizenship. Insofar as the proof in the case at bar shows, the Naturalization Court may very well have known a great deal more about petitioner than did Judge La Buy. The courts below made haphazard findings of fraud with no basis in the evidence and with utter disregard of the limitations placed upon the Government by the allegations to be found in the complaint."

The Government Attorneys, in the case at bar (p. 8) have introduced an argument new to the case as follows:

"The evidence further showed, in corroborative detail, the opportunity which petitioner had to effect his entry using Paul Maglio's identity and the scheme which he employed in asking, at the time of naturalization, that his name be changed to Paul De Lucia, so that any inconsistencies in identity arising because of his marriage record or otherwise would be obscured."

The answer to this is that assuming that petitioner did have trouble in Italy and had succeeded in entry here by use of another name and further concealment, all De Lucia needed to do was to keep quiet about names in the year 1928. De Lucia had filed his declaration of intention

in a state court. (Government Exhibit No. 4, Vol. II, p. 8) Petitioner in 1928 was being put through the usual process. There was no need to mention the name De Lucia. Even an immigrant in his twenties, only fairly cognizant of our language (Vol. I, p. 103), intent upon fraud, or the employment of a "scheme", would know enough to keep quiet about any change of name and obtain his certificate under the name used in the previous papers. Change of name could have been accomplished later, with or without court proceedings, without the risk of prompting the officials to ask a large number of questions. Petitioner could have remained silent as to name and avoided the chance of causing the Naturalization Judge to inquire into family history, or into reasons for the use of more than one name, etc., Is it not more reasonable for Your Honors to conclude, in the absence of any evidence as to what did happen before the Examiners, that the entire matter was fully and truthfully discussed? Your Honors can be certain that there had been some discussion as to name and reason for change, from an examination of Government Exhibit No. 2 (Vol. II, p. 3), being a preliminary questionnaire signed on February 21, 1928. Although Examiner Durisch did not remember the incident (Vol. I, p. 93) he did cause the Face Brief to show that petitioner desired a change of name. We copy from the Face Brief, Exhibit 3, (Vol. II, p. 6) filed April 10, 1928.

Petitioner: Wants: PAUL DE LUCIA

Name MAGLIO, Paul

Your Honors will note from Exhibit 2, (Vol. II, p. 3), that the printed form is in part as follows:

"My full, true and correct name is .....

I have ..... used another name .....

I used that name because .....

So the officials in preparation of the blanks anticipated that different names would often be used. Naturally the officials were interested in the reasons. Petitioner wrote in the last space above,

"I got married on that name."

In the absence of further testimony on the subject, Your Honors know that any official would ask questions to determine how long the name Maglio had been used; how petitioner happened to get married under another name, etc. If all of this was truthfully explained to the satisfaction of the official there is nothing to the charge that a scheme had been employed. In the absence of evidence, Your Honors must judge from circumstances. We submit that even a young immigrant would know that when he answered the above questions as he did concerning the use of more than one name that he invited further inquiry. The argument presented here in opposition for the first time in this case should boomerang. Before Judge La Buy the Government proved by Father Scola, (Vol. I, p. 148) the priest in custody of the church records, that petitioner was married in his church January 30, 1927. Petitioner had filed his Declaration of Intention (Vol. II, p. 8) on January 9, 1925 under the name of Paul Maglio. In this declaration there is no mention of the name De Lucia. There is no evidence that the priest, or anyone else, knew that the Paul De Lucia so married had pending naturalization proceedings under another name. On Feb-

ruary 21, 1928, petitioner filled out the Preliminary Form, Government Exhibit No. 2, (Vol. I, p. 314, Vol. II. p. 3) in which petitioner declared that he had been married under the name Paul De Lucia. There is no evidence that the Examiners knew anything about the name used by Petitioner at the time of marriage until petitioner gave that information. We respectfully submit that if in fact petitioner had been working a scheme he would have said nothing about any Paul De Lucia. It is more reasonable to believe that petitioner had adopted the policy of telling the truth in order to not risk the obtainment of a certificate vulnerable to future attack. Or if he didn't think of the possibility of future attack, he must have thought of the chance that the officials would learn before he went before a judge that he had been using the name De Lucia. Such thought might have prompted him to not attempt to conceal anything about his background. If we are to speculate and guess it never seems to occur to prosecutors that some guesses might be based upon conduct free from fraud, misrepresentations and concealments. Assuming that the proven fact, that petitioner applied for a change of name, may give rise to the inference stated by our opponents and further that the proven fact might also furnish grounds for the inference of proper conduct, we may in such event have a case where two inferences can be made. This Honorable Court stated the rule in *Penna. R. Co.* v. *Chamberlain,* 288 U.S. 333, 339, as follows:

> "We, therefore, have a case belonging to the class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." (citing cases)

Apparently the Government Attorneys have overlooked the following which we quote from our brief (p. 49):

"The Court of Appeals said, we repeat, herein p. 80:

> 'Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.'

"There is no evidence that De Lucia did not use his own name at all relevant times. His name at the time of entry was Paul Maglio. That was his name up to the time it was legally changed by the Naturalization Court. Judge La Buy found that in Italy his name was Felice De Lucia, but without further findings, such fact was immaterial. Here again Your Honors will note that the path of inquiry had been opened. *Cf. In re Iwanenko's Petition*, 145 F. Supp. 838.

"There is no evidence concerning what the Immigration Officials may have learned. What we do know for certain is that the Naturalization Court had before it the conduct of De Lucia during his probationary period and that that Court decided the matter in favor of citizenship.

"Perjury must be false swearing as to a matter material. The name used does not appear to be material. Judge La Buy must have realized that the use of a name alone would have been immaterial, so Judge La Buy coupled such use with a finding that the use of a name prevented investigation into eligibility. There was no prevention or interference shown. The courts below ignored the absence of evidence concerning prevention or interference. Every step taken by De Lucia on his way to citizenship was fully investigated, insofar as is shown by the evidence. Petitioner was eligible for citizenship and was found to have been eligible by the Naturalization Court."

We shall not repeat any more of our argument concerning the use of a name (pp. 46, 57), but in view of the new

argument presented here in the Brief for the Opposition to the effect that petitioner asked for a change of name in order to obscure inconsistencies in identity, we call attention to the deposition of Examiner Jordan (Vol. I, p. 289):

> "Miss Martin (Assistant United States Attorney):
> Q. On the face of Exhibit 2 (here Exhibit 3, Vol. II, p. 6) it says: 'Petitioner wants: Paul De Lucia.' What does that mean?
> Examiner Jordan, A. That he wanted to include in his petition a prayer for a change of name.
> Q. His name being Paul Maglio and he wanted it changed to Paul De Lucia? A. That is right.
> Q. But the practice was to require him to sign in his present name? Q. That's right.
> Q. Not in the name he wanted? A. That's right."

So Your Honors will see that petitioner was compelled to use the name already used on his Declaration of Intention. It follows that if in fact at the time petitioner was examined by Mr. Durisch in 1928 (Vol. I, p. 86) petitioner had explained to Mr. Durisch a good reason for having used two names and had expressed a desire to present his final petition in the name of De Lucia, Mr. Durisch would have informed him of the regulations. The important thing to keep in mind is that all of this could have actually happened. There is nothing in the testimony of Examiners Durisch and Jordan, nothing in the exhibits, nothing in all of the evidence for the Government to show that petitioner did not fully and truthfully explain and tell about his history, status and experiences. It will be noticed that although the United States Attorney presented Examiner Durisch with the Face Brief (Exhibit 3, Vol. II, p. 6) and Mr. Durisch explained in detail many of the entries and markings on the Face Brief (Vol. I, pp. 102, 103, 104) Examiner Durisch said nothing about the name Paul De Lucia or change of name in this connection. We mention this to

show the weakness of testimony from witnesses having no memory of the event. Perhaps if Mr. Durisch had been asked the direct question he would have included in his explanation that the Face Brief indicated that there was some discussion concerning change of name.

The witness Francis Rando, a lawyer attached to the State Department, testified (Vol. I, p. 245) that he was ordered on March 11, 1957 by the head of the Passport Office to consult with the American personnel in Italy to find certain documents. Your Honors will note that the complaint was filed October 10, 1956 (Vol. I, p. 360). The affidavit to show good cause was sworn to on August 9, 1956. It is our respectful contention that the officials filed the complaint first and then started to hunt for the evidence. The prosecutors depended upon proving the Government case by means of pretrial proceedings. But when petitioner, by his answer filed February 7, 1957, (Vol. I, p. 15) indicated that he would claim privilege by virtue of the Fifth Amendment, the prosecutor started to look elsewhere. Also please note that the prosecutor took the deposition of Mrs. Margaret Terrible on March 4, 1957. When it appeared that the witness did not identify petitioner as the Felice De Lucia involved in the homicides, Mr. Rando was given his mission.

Surely, Mr. Rando inquired about the defendant in Italy, that was part of his job. Yet he did not say a word, or was he asked a question about what name was used by the defendant. It is reasonable to assume that Mr. Rando had the information we now obtain from Exhibit 3 (Vol. I, p. 314, Vol. II, p. 3) including the name of the ship, dates, the fact that the ticket was purchased by an Agency in Naples, Italy; the fact that petitioner took the ship from Boulogne, France; the name of the person he was going to see and his destination in this country. Mr. Rando must

have known that the defendant left Europe from France. Is it not reasonable to assume that Mr. Rando learned what name was used by the defendant in France and how long he lived there? In order to embark in France, petitioner was compelled to cross the border from Italy to France. Did not Mr. Rando learn of the visa and how it had been procured. Most likely, the French authorities and the shipowners would not have permitted departure without proper papers. Or the Government should have shown why Mr. Rando did not learn such things, if any reason existed. In the absence of proof Your Honors must conclude that this information was obtained and withheld. The Government is in no position to claim that the information shown to have been given by petitioner was such that petitioner "thwarted" investigation as to his eligibility for United States citizenship. One can not very well thwart an investigation never commenced. There is no evidence that further investigation than that made about 30 years ago was desired or instituted.

There is nothing in the complaint to charge any irregularity in the issuance of a passport or the securing of the proper visa. We must assume that the Department of Labor would not have issued the Certificate of Arrival if the defendant had not passed inspection. There is a presumption of regularity in official action. *Ussi* v. *Folsom*, 254 F. 2nd 842. He could not have passed inspection without a passport containing a visa. We note from the cases involving passports and visas that the American Counsel requires an applicant to fill out a form including information as to previous arrests.

The case at bar might very well be compared to a suit in equity to set aside a judgment based upon newly discovered evidence. In such cases the moving party must show that not only that he failed to discover the new evidence, but he must show further that his failure was not

attributable to his own want of diligence. A defense is not deemed to be newly discovered, if it was, or ought to have been, within the knowledge of the party at the time the original judgment was procured. *Pickford* v. *Talbott*, 225 U.S. 651. In the case at bar the Trial Judge overlooked the duty of the Government to prove such elements. The theory of the Government was that the officials did not know of a previous arrest, that if the officials had known of any previous arrest such fact would have been shown and the result would have been denial of citizenship. Upon this theory, the plaintiff expected Judge La Buy to believe that the arrest and criminal record was discovered for the first time nearly 30 years after the granting of citizenship. We submit that the Government should have proved something about when and how this new evidence was discovered, (if it was new) in order that Judge La Buy could find that there had been no lack of diligence, that the evidence was not known at the time of the judgment. The Government should have proved circumstances to prove that it was not reasonable to find that the new evidence ought to have been known at the time of Naturalization. If the Trial Court had required this burden to be met, the Government would have been required, among other things to prove by Mr. Rando, either that there was no record in the office of the American Counsel, or that the record did not contradict the theory of the Government. The failure to examine Mr. Rando on this subject should have prompted Judge La Buy to infer that the officials nearly 30 years ago did have knowledge of the background and experiences of petitioner, assuming for the sake of argument that petitioner had been convicted of crime in Italy. The record in the office of the American Counsel should show either one of the following:

(a) Petitioner obtained his visa with no mention of any conviction or by falsehoods and the Counsel ap-

proved the issuance of the visa in ignorance of the facts.

(b) Petitioner obtained his visa after a full disclosure of the conviction including the surrounding circumstances and the Counsel approved the issuance of the visa in full knowledge of the facts.

There is the possibility that petitioner had no arrest or conviction, but for the sake of argument, we are assuming that petitioner is the same person named in the foreign documents. After the evidence was closed before Judge La Buy, it became too late for the United States Attorney to claim that there was no record, or that the file had been lost or destroyed. There was no proof along that line. Judge La Buy said nothing about this failure of proof. Whenever Judge La Buy noticed a gap in the chain of circumstances intended to establish the case for the Government, Judge La Buy assumed that the burden was on De Lucia.

If Mr. Durisch asked questions to bring forth the information that the defendant had used the name Maglio in Italy and in France and had become known in certain quarters by that name, no doubt all Mr. Durisch would have done would be to check the face brief as described. Mr. Durisch was not asked nor did he say that such conversation did not take place.

We have no evidence at all as to what may have happened before the Designated Examiner. The law required the defendant to wait at least 90 days after he filed his Petition for Naturalization before he went before the Court. If the usual custom was followed, Mr. McKay examined petitioner on the same day the petition was filed (Vol. I, p. 96). The record is silent as to what the Designated Examiner McKay did in those 90 days. If he made a report, the Government has it and failed to produce it. If he made no report, the Government failed to prove that fact.

When Your Honors study the deposition it will be found that Mr. Jordan recognized a J as his handwriting on the Face Brief (Exhibit 3, Vol. II, p. 6) and that indicated that he had taken the defendant to court. That is all he knew. He did not remember the defendant or the occasion. He told about the usual custom and the prosecutor asks us to infer without evidence that there was nothing in the way of proceedings before the judge. In the absence of evidence, withheld by the plaintiff, Your Honors will presume that the judge did all that was required and that he was not deceived.

After the evidence in the case at bar was closed, the parties submitted briefs to the Trial Judge. Petitioner made a point of the fact that Designated Examiner McKay had not been produced or accounted for. Judge La Buy took notice from a reply brief of the death of Examiner McKay. (Vol. I, p. 335)

The prosecution not only failed to prove the death of Mr. McKay but they failed to make any attempt to prove by anyone else what, if anything, took place before him. Nor was any attempt made to explain why such additional evidence could not be produced.

In *Penn-Texas Corporation v. Morse*, 242 F. 2nd 243, after trial plaintiffs failed to establish any right to equitable relief and the trial judge dismissed the complaint on the merits for want of equity. In affirming Judge Finnegan said, p. 248:

> "These plaintiffs cannot select what they will reveal and then expect equitable relief. Strategy has its uses but full disclosure would have been more suitable before the chancellor below."

Although Mr. Jordan said that the Designated Examiner usually examines the applicant and his witnesses in the presence of each other (Vol. I, p. 292) and Mr. Fish (Vol. I, p. 74) is shown to have been one of the wit-

nesses, not one question was asked Mr. Fish seeking to show what happened before the Designated Examiner. The prosecution dropped the matter, preferring to rely upon speculation and inference that the Designated Examiner asked certain questions and received false answers. There is nothing on the face brief or any other paper in evidence to show what may have happened when Mr. McKay took over. The Examiners Durisch and Jordan told of the custom and it appears that when the Preliminary Examiner finished he made use of the applicant as a messenger to deliver the papers to the Clerk of the Naturalization Court. The witnesses were sent along and if the custom had been followed, all were required to sign and swear to the petition in the presence of the Clerk and each other. Mr. Fish would not say that he saw petitioner sign. An examination of the testimony of Mr. Fish will show that even if a custom existed, as described by Examiner Durisch and Jordan, that custom was not followed in the matter of the naturalization of petitioner. Mr. Fish was not even asked if he was required to swear to the affidavit signed by him. Mr. Fish at the time of signing the affidavit, was a newspaperman. It is common knowledge that the rules are often broken to accommodate the representatives of the press.

When Your Honors examine the Petition for Naturalization (Vol. I, p. 323) it will be seen that Mr. Fish signed an affidavit naming the defendant as Paul Maglio. Yet Judge La Buy found, contrary to the written record, that Mr. Fish did not know that the defendant used the name Paul Magio. We quote (Vol. I, p. 326):

> "To this end the government's evidence consists of the testimony of Michael J. Fish, who identified this defendant as the same person for whom he appeared and signed as a witness during the naturalization hearings preceding the granting of the certificate. Mr.

Fish testified that at that time he was employed as a staff photographer for the Chicago Tribune; that at that time Paul De Lucia was a restaurant manager; and that he did not know the defendant used the name Paul Maglio."

It is very possible that the finding made by Judge La Buy is absolutely correct and Mr. Fish did not know that petitioner ever used the name Paul Maglio. Mr. Fish may have signed the affidavit (Vol. I, p. 323, Vol. II, p. 1)

"..... that he has personally known Paul Maglio, the petitioner above mentioned ....."

without reading it. Also Mr. Fish may have signed with no one else present and without meeting the Designated Examiner. We quote from the testimony (Vol. I, p. 75)

"Mr. Bickley, Assistant United States Attorney: Q. Did you have occasion to sign the document as a witness, sir?

Mr. Fish: A. Yes, sir.

Q. Who else signed as a witness, if you know?

A. Well, there is a Frank Meo here * * *

Your Honors will note that Mr. Fish evaded answering the question. The record shows that he was being shown the petition for naturalization. All he answered was that he observed the name Frank Meo on it.

Q. Who signed as petitioner to that document? * * * I am referring now to Government's Exhibit 1 for identification. This is a petition for naturalization and it is signed by an applicant.

The Witness: You mean, did I actually see him sign it? * * * No, I do not remember seeing him sign it."

We submit that that is another evasive answer. We quote further:

"Q. Do you know who signed that document.
Mr. Stewart: I object.
The Court: Well, if he did not see it, I do not know how he would know it."

At this point the prosecutor dropped the subject, leaving it stand that Mr. Fish did not know of his own knowledge who signed the petition as applicant. He was not asked if he saw the other witness sign. He was not interrogated as to whether or not he was asked any questions by an Immigration Official. He was not asked whether or not he ever heard any official question petitioner. He was not asked if he was either excused from going to court, or if he did go to court.

When the record is examined, the finding above made by Judge La Buy from which we quote should be given no weight:

"..... and did not know the defendant used the name Paul Maglio."

Judge La Buy might just as well have found that Mr. Fish knew nothing about the case other than the fact that he was able to identify his signature on an affidavit. The fact that Mr. Fish did not know that petitioner had used the name Paul Maglio should have been given no weight in the determination of the issues.

Mr. Fish was not asked nor did he say anything about having been examined by Mr. Durisch. It is just as reasonable to say that he never went to the Immigration Department office as to guess that he was there. This shows how unreliable proof of custom can be if we did not know that regular procedures are not always employed. The circumstances proven, without dispute, should have impelled Judge La Buy to find as a fact in this case that the usual and customary proceeding was not followed.

It is reasonable to assume that court records were made in addition to those introduced into evidence before Judge La Buy, as for instance, clerk's records and notations; judges minutes. Mr. Durisch in describing the customary procedure followed in those cases where the judge acted solely upon the recommendation of the Designated Examiner said, (Vol. I, p. 97):

> "Well, then, when that period of time was up, the petitioner was notified to appear with the other persons who were the same kind of cases at a final hearing in one of the courtrooms. The judge would be informed of the recommendation of the case, and upon accepting a grant recommendation, a person would be given the oath of allegiance and the court would sign an order covering the list of cases for that particular day, and the Clerk of the Court could then issue a Certificate of Naturalization to the newly naturalized persons."

So Your Honors will note that if such procedure had been followed, the order admitting petitioner would have been based upon a list signed by the judge. No such list was produced. Its absence was not accounted for. In its absence we assume that the name of petitioner did not appear on any such list. Further that the judge considered the application and further testimony as described in the order. (Vol. II, p. 2) That petitioner was not admitted solely on the recommendation of the Designated Examiner. There is no evidence that the Designated Examiner said anything, good or bad, about petitioner. There is no evidence that the Face Brief or the Preliminary Form was ever exhibited to the judge, or called to the attention of the Court. Such evidence and lack of proof destroys that thought to be a foundation for the decree.

If other applicants were admitted to citizenship they could be expected to remember the event. No attempt was made to make proof along such line, no effort

was made to show Judge La Buy why such evidence was not forthcoming. The failure on the part of the prosecutor to prepare his case properly for trial might be explained when we observe from the record that the United States Attorney counted on proving his case by virtue of pre-trial proceedings. Then when the prosecutor found that the Trial Judge was of the opinion that De Lucia had no constitutional right to refuse to answer oral interrogatories, the prosecutor concluded that no evidence further than that produced was required. Such theory is easier on the prosecutor than to have Your Honors conclude that the prosecutor examined the records, determined that they would contradict the theory of the Government and withheld them. The gaps are there, no matter how they happened to have been left.

We again quote from Judge La Buy (Vol. I, p. 328):

> "The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization."

After further review, Judge La Buy said (Vol. I, p. 329):

> "The court is of the opinion that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court."

There was no proof of perjury and there was no evidence to show fraud on the court.

It is obvious that the defendant used the name of Paul Maglio when he entered this country. Or to put it another way, petitioner was named Paul Maglio when he entered.

In so far as the evidence reveals the facts, a passport and a visa were granted petitioner and the officials in charge of the grant intended petitioner to have them. They were issued after regular procedures and accepted as genuine by those having to decide whether or not petitioner should enter.

We again copy from the complaint (Vol. I, p. 5):

> "(V) That in truth and in fact the defendant's entry into the United States at New York City on August 12, 1920, was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.
>
> 7. That the said defendant, Paul De Lucia formerly known as Felice De Lucia, assumed the identity of Paul Maglio, in order to conceal his true identity, to hide from the immigration officers at the time of his arrival, * * * the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy, and that he had fled from Italy in order to escape arrest for a subsequent prosecution.
>
> 8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

Your Honors now know that a proper arrival Certificate was duly issued in regular form. The charge made in V above about not having a Certificate was unfounded. The pleader must have known that it could never be proved and further that it would be contradicted the moment the Government placed the Petition for Naturalization into evidence. This is one of the reasons we say the prosecutor filed a complaint known by him to contain false and un-

founded allegations. It can be assumed that a copy of the Petition for Naturalization with the Certificate of Arrival was in the file of the prosecutor. Also in the file when the affidavit to show cause was made. This affidavit includes the false statement that there was not attached a Certificate of Arrival. (Vol. I, p. 9) It can be inferred that the above allegation was placed in the complaint in anticipation of a motion to dismiss. Other grounds for cancellation may have presented difficulties in pleading. But on a motion to dismiss, no defendant could afford to admit for the purpose of the motion that he had no Certificate of Arrival. Judge Finnegan, in *United States* v. *Minnerich*, 250 F. 2nd 721, 726 said concerning an affidavit of good cause;

> "These affidavits are the means by which courts can ascertain whether the United States Attorney's conclusion about instituting denaturalization proceedings dictated what the reasoning ought to be, in contradistinction from an affidavit showing the basis for reasoning which determined what his conclusion in that regard shall be."

Judge Finnegan also said, p. 725:

> "From such an affidavit an experienced judge should be able to detect a United States Attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard."

We respectfully submit that when it appears that the courts below fail, to detect, or detect and do nothing about it, this Honorable Court is duty bound to enforce the safeguard, for the protection of naturalized citizens against reckless categorization, non critical selection of candidates and affidavits known to have been false.

We have gone into detail, including the above quotation from the complaint as we wish to bring before Your Honors the manner in which the pleader alleged that the false representations were material. Also the effect said to have been achieved by false representations. Your Honors will note that in the complaint the alleged false representations were related to the entry. There was no evidence of any representations, true or false, at the time of entry. The Attorneys for the Government here did not see fit to answer our argument under the following heads (pp. 59-31):

> **The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.**
>
> **In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.**

The argument made by the Government gives no heed to the above points and therefore could lead Your Honors away from the issues. In this reply we seek to bring the above contentions back into the case.

We now quote from Mr. Jordan (Vol. I, p. 273) to show that there was absolutely no connection between what defendant may have written or said and the issuance of the Certificate of Arrival. The Certificate of Arrival was issued before the defendant filed anything in the case.

> "Examiner Jordan: A. The applicant's Declaration of Intention would accompany this form when the applicant submitted it and the Declaration of Intention and this form would be assembled with the Certificate of Arrival produced by the Naturalization Service.

Miss Martin, Assistant United States Attorney: Q. When you refer to a Certificate of Arrival, where would that form be created? When would that first originate?

A. At that particular time I believe those certificates of arrival were procured before the Declaration of Intention was filed and were kept in the office with the Naturalization Service in the District field headquarters."

Judge La Buy said further (Vol. I, p. 333):

"The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States (Citing cases)

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship."

There is no evidence that petitioner did not explain the use of the two names, first to the Examiners and then to the Naturalization Court. The circumstances proved indicate that explanations were in fact made. The full explanation is not before Your Honors partly because Examiner Durisch could not remember this defendant or the conversation. (Vol. I, p. 93) As we have pointed out, Examiner Durisch was not even asked about what conversation may have been had with him about the name. It is a good guess that there was some discussion for the reason that Mr. Durisch caused to be typed on the Face Brief (Exhibit No. 3, Vol. II, p. 6) "Wants: PAUL DE LUCIA." There is no such request written on the Preliminary Form (Exhibit 2, Vol. II, p. 3) No evidence suggests that any investigation was thwarted. The examiners

made all of the investigation thought necessary to determine if defendant possessed the qualifications. The evidence shows he did have those qualifications. At any rate, the Naturalization Court found that petitioner was qualified. There is no evidence that he was not, even assuming that he had been arrested and convicted more than five years previously in Italy.

Your Honors have already noticed that Judge La Buy included:

> "unless it is shown that this name had been one assumed and used prior to entry into the United States."

We ask ..... shown to whom? The burden was on the Government to show the negative. At any rate, the defendant passed inspection and was admitted in 1920. In the face of his Certificate of Arrival and the judgment it is too late to question the legality of his arrival. Furthermore, as we have said, no evidence was introduced from which an illegal entry can be determined.*

Your Honors will note from *United States* v. *Grabina*, 119 F. 2d 863 that the defendant obtained his papers under the name of Ginsberg. Judge Swan said, p. 864:

> "Anyone checking his entry must have known that he entered as Josek Grabina."

So the change of name did not in fact deceive the officials.

In view of the record showing that the Naturalization Court heard witnesses in open court (Vol. II, p. 2), the fact that the petition requested a change of name and the statutory requirement that good cause must be shown, before a name change will be allowed, it is fair to assume that the Naturalization Judge satisfied himself as to the reason petitioner made his original application in the name

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* If this decree could, under the evidence, be based upon illegal entry a point of law suggested in **Lehmann v. Carson**, 353 U.S. 685 and **United States v. Menasche**, 348 U.S. 528, might arise. Petitioner may have acquired a status saved by Section 405(a) of the 1952 Act, 66 Stat. 163, 8 U.S.C. § 1101 **et. seq.**

of Maglio. There can be no doubt but what the Judge inquired as to the true name and ascertained enough of the facts to make an intelligent judgment. If in fact the Naturalization Judge ordered the change of name without requiring any explanation from the defendant there had been no representations, true or false. If the Naturalization Court acted upon the Petition alone, all that contained was a prayer. (Vol. I, p. 322) The order of Court should put an end to the matter of the name.

Your Honors will notice from the photostatic copy of the Petition for Naturalization (Vol. II, p. 1), that just above the signature Paul Maglio and added by typewriter there appears the following:

> "..... and that his name be changed to Paul De Lucia"

This petition was prepared under the supervision of the officials by a clerk in the office of the Service. (Vol. I, p. 96) It is fair to assume that before this request for change of name was included there had been some discussion. On the reverse side of the Certificate of Naturalization there appears the following:

> "By order of court, name changed from Paul Maglio."

We ask, is not that a judicial finding that the name before the change was Paul Maglio?

Permit us to review the cases cited as authority for that quoted above by Judge La Buy concerning the use of an assumed name. Your Honors will note that the Court of Appeals chose to cite (p. 80, 256 F. 2nd 487, 490) only two of the following cases, *i.e.*, *Landon* and *Schlotfeldt*. The Attorneys for the Government in this Honorable Court reduced the number to one, *i.e.*, *Landon* (p. 9). We return to all of those cited by Judge La Buy, for after all, if the District Court failed to distinguish cases, such failure was bound to have had an effect when it came to the making of findings.

**United States v. Goldstein, 30 F. Supp. 771.**

It appears that the defendant, in *Goldstein*, after his arrival and after filing his application for citizenship, admitted that his entry was illegal because he had entered under a passport issued illegally. On the day his petition was filed, Goldstein told the Examiner his right name and said he used another name because it was the maiden name of his mother. Evidently that explanation was accepted as the defendant was admitted to citizenship. Five years later the defendant was examined. We quote from Judge Campbell, p. 772:

> "On May 11th, 1936, an examination was conducted by Immigrant Inspector Marcus Rebach, in the presence of Sussana Kramer, stenotypist, and respondent therein stated that his real name was Isac Goldstein, and not Israel Grun, and that he had used the name of Israel Grun for the purposes of evading military service in Romania. On the said examination respondent also admitted that Israel Grun was his cousin, two years his junior, and that he, respondent, had obtained his passport to the United States, by making false declarations as to his name and age, and also that the statement in the declaration of intention, as to his name, was untrue."

As a matter of law applied to the facts, Judge Campbell held, p. 773:

> "The term 'residence' as used in this Act, is 'legal residence' and anyone who enters this country illegally cannot thereby acquire a legal residence as a basis for application for citizenship.
>
> "The use of a fraudulently procured passport to gain admission to this country is unlawful."

Further on in the opinion, Judge Campbell stated that, p. 773:

"—what the respondent offered was a passport, not issued to him, but to his cousin, which act was a wilfully fraudulent one, and rendered the respondent ineligible for citizenship—"

We submit that the *Goldstein* case is easily distinguished from the case at bar. Your Honors will note charges in the complaint in *Goldstein*, p. 772, not to be found in the case at bar, *i.e.*

> (1) respondent never established a lawful residence in the United States, in that he entered this country illegally and pursuant to a fraudulently procured passport, * * * (3) he had not behaved as a person of good moral character during the five-year period next preceding the filing of the said petition for citizenship.

The District Judge found, p. 773, that:

> "* * * what the respondent offered was a passport, not issued to him, but to his cousin * * *"

The authorities are collected in 5 C. J. S. § 1564 (8), p. 1311 to support the following:

> "It is not presumed that the judge found facts sufficient to support the judgment entered where it is apparent that he acted under an erroneous conception of the applicable law."

See also *Billington* v. *Prudential Ins. Co.*, 254 F. 2nd 428.

**United States v. Shapiro, 43 F. Supp. 928.**

The defendant in the old country paid money for a passport and a quota immigration visa issued to another. She knew at the time she received the passport and visa that they were not issued in her name, or to her. The District Court stated these facts with some detail and there was no question but what such facts had been proved. The Court concluded from the proof that there had been no lawful entry. It followed that without lawful entry, the defendant had not established a legal residence. Citizen-

ship was revoked. In the case at bar, insofar as the evidence reveals, the officials of Italy gave petitioner his passport and the American Counsel issued a visa. They intended that he should have these papers in whatever name issued. *Cf. Fink* v. *Reimer*, 96 F. 2nd 217.

**United States v. Perez, 29 F. Supp. 888.**

Here the defendant stipulated that he entered on a passport issued to his brother. It appears that defendant was more concerned in securing a recommendation from the court than in a contest on the merits. The District Judge paved the way for a new petition. No authorities are cited.

**United States v. Marino, 27 F. Supp. 155.**

The defendant entered on a passport secured by a false statement that defendant had been here before. This was done in order to secure the benefit of certain legislation. It appears that the defendant is illiterate and not eligible for citizenship. His main defense was that the United States was barred by laches.

The fact that this alien although illiterate could have gone through the process should cause Your Honors to suspect that the alleged usual and customary procedure described by Mr. Durisch was not always followed. Mr. Durisch (Vol. I, p. 95), said that under the usual practice an applicant was requested to sign his name for the purpose of determining if he could write. That the applicant was given an examination in order that the Examiner could determine his knowledge of English and Government, and knowledge of the Constitution. A grade was given followed by the initials of the Examiner. An illiterate immigrant could not pass such an examination.

**Fink v. Reimer, 96 F. 2d 217.**

See also same case in 16 F. Supp. 487. It appears that in previous litigation the citizenship of this defendant was cancelled and he pleaded guilty to an indictment charging him with procuring naturalization illegally. The correctness of the denaturalization or the legality of the jail sentence was not before the Court in 16 F. Supp. 487. Here we have a habeas corpus proceeding intended to stop deportation. The defendant had the status of an alien and the burden was on him to show legal entry.

The effect of the denaturalization decree was to not only put the defendant back into the status of an alien, but to be regarded as having never obtained citizenship. So this amounts to an alien deportation case.

As part of the return defendant's admissions made to the Examiner reveal the whole story of the fraud perpetrated by him in obtaining his immigration visa. He pretended to be one Apfelroth who had previously started proceedings to obtain a preference because of a son living here. Judge Hand said, p. 218:

> "An alien who enters under a passport and visa fraudulently obtained is 'not entitled * * * to enter' under the act of 1924. It is true that to be admitted as a quota immigrant Fink only had to have 'an unexpired immigration visa,' section 13 (a) (1) of the Quota Act of 1924, 8 U.S.C.A. § 213 (a) (1), and that he did have one; both passport and visa were in fact issued to him, that is, to the man who appeared before the officials though under the name, Apfelroth. It is hardly true, therefore, to say that the documents were 'no' passport and 'no' visa; they were not for instance like passports issued to another person, whom the bearer pretends to be. Moreover, a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue the visa. *United States ex rel. Iorio*

> v. *Day*, 34 F. 2d 920; *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263; *McCandless* v. *United States ex rel. Murphy*, 47 F. 2d 1072, appears to be to the contrary. In any case the fraud here was essential to success; Apfelroth could get a preference visa, Fink could not."

Need we remind Your Honors again that no question of passport, visa or entry was involved in the case at bar.* The judgment of the Naturalization Court settled these matters for all time and therefore the cited cases take us way off the track.

It appears that Judge La Buy failed to notice the distinction between cases involving aliens and those relating to naturalized citizens. This may explain why the Court of Appeals dropped these cases. If so, we respectfully submit that that Honorable Court should not have approved the law findings made by Judge La Buy. The findings of fact made by Judge La Buy concerning the use of a name are entitled to no weight because of the misconception of the law evidenced by the citation of these cases.

**Landon v. Clarke, 239 F. 2d 631.**

Same case 139 F. Supp. 113. This was a habeas corpus proceeding. Defendant about to be deported after an administrative hearing took out the writ. She had not applied for citizenship. The officials got after her within six months of her entry. The trial judge discharged her and the Court of Appeals reversed. The case is clearly not in point and it will serve no good purpose to go into detail.

The Attorneys for the Government here in the case at bar cite the *Landon* case as follows:

> "The Court of Appeals examined the record and found the district court's findings to be fully sup-

* Unlawful entry is a crime involving moral turpitude. **De Bernardo v. Rogers**, 254 F. 2nd 81. Haphazard findings with no basis in the evidence should be disregarded.

ported by the evidence and its conclusions of law amply supported by the federal cases.

These conclusions of both courts below are required by logic and law. Both courts pointed out that the use of an assumed name to gain entry into the United States may be grounds for deportation. *Landon* v. *Clarke*, 239 F. 2nd 631 (C.A. 1)."

Our opponents neglect to point out that *Landon* is authority for the deportation of an alien who made use of an assumed name to gain entry. Surely Your Honors know the difference between an alien found here with no right to stay in this country and a naturalized citizen. The Government seeks to not only regard the naturalized citizen as a second class citizen, it has succeeded in having the courts below regard petitioner as if he were an alien. Instead of making any effort to answer the argument made in our opening brief, our opponents repeat the errors of the courts below. It can not be that they expect that Your Honors too will be unable to distinguish between cases involving aliens and those such as the one at bar. Surely our opponents can not hope that Your Honors will regard petitioner as having no further rights than those of an alien. We trust that Your Honors will see fit to express a contrary view.

**United States ex rel. Liebowitz v. Schlotfeldt, 94 F. 2d 263.**

Judge La Buy, after citing the above cases on the question of name used has asked the reader to compare this case. This was a habeas corpus proceeding. The District Court discharged the alien held on a deportation warrant. In affirming, Judge Major said, p. 265:

"We reach the conclusion under the circumstances presented, that no fraud was intended, and, as a matter of fact, none was perpetrated on this government by appellee in obtaining his immigration visa.

Whether the use of such name and age enabled him to escape military service in some other country, we are not directly concerned. He was within the

quota provision, could have obtained his visa by stating his correct name and age, and otherwise met the prescribed requirement to enable him to effect a legal entry. Therefore, the misrepresentation complained of were irrelevant and do not constitute grounds for deportation."

In *In Re Liebowitz*, 49 F. Supp 953 where Judge Holly admitted this alien to citizenship the District Court said, p. 954:

> "The Circuit Court of Appeals held that the alleged false statement made by him as to his name to obtain entry to the country was not sufficient grounds for deportation and I am of the opinion that the use by him of the name Feive Leibowitz is not a sufficient reason for denial of naturalization.
>
> (2) As a matter of fact his name at the time of his entry into the United States was Feive Leibowitz. At common law and in the absence of statutory restriction an individual may lawfully change his name without resort to any legal proceeding and for all purposes the name thus assumed will constitute his legal name just as though given at birth. *Reinken* v. *Reinken*, 351 Ill. 409-413; 184 N.E. 639; *United States* v. *McKay*, D.C. 2 F. 2d 257; *Christianson* v. *King County*, D.C. 196 F. 791. And the fact that he took the name of another living person, even the name of his brother, it seems to me, does not change the rule."

The case at bar and the cited case would be much alike if the Government now filed a denaturalization case against Liebowitz based upon the same objection considered by Judge Holly. Your Honors know of course that the next judge would lack jurisdiction to try the objection over again. After all a judgment does settle some things.

The Court of Appeals cited two of the cases cited as above by Judge La Buy as follows: (p. 80, 256 F. 2nd 487,49)

"(4) The use by an alien of an assumed name to gain entry into the United States, is ground for deportation, *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263."

The Court of Appeals did not indicate the manner in which the law applicable to aliens had anything to do with this case. As Your Honors know an alien must satisfactorily explain. The citizen need not. Where the burden of proof lies is important. This was often lost sight of in the courts below.

**United States ex rel. Volpe v. Smith, 62 F. 2d 808, 812.**

Judge Major in the *Schlotfeldt* case said enough about the *Volpe* case to show that it is not in point in the case at bar.

We repeat the last two sentences from the above quoted portion of the opinion of the District Court (Vol. I, p. 337):

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship."

Judge La Buy, without any evidence to support his conclusion, assumes that the use of the name Maglio was unexplained.

How anyone can say it was unexplained in the face of this record is difficult to understand. Your Honors know that it was necessary to explain to the Naturalization Judge. The Immigration Statute, Title 8 § 1447, provides for the change of name in the discretion of the court upon the bona fide prayer of the petitioner. As we have said a Naturalization Judge would obtain the facts before the exercise of discretion and would inquire to see if the prayer was bona fide.

It is certain that any applicant for citizenship who might include a request for change of name would expect to be questioned on the subject.

We learn from cases such as *Landon* v. *Clarke*, 139 F. Supp. 113, that our consular officers require certain information before a visa is issued. Judge Wyzanski said concerning an application for a visa:

> "(1) As the above authorities indicate, it was apparently well settled by tribunals of distinction that misstatements in the application, even if knowingly made, were not to be regarded as grounds for deportation in the absence of a showing that the misstatements were prejudicial to the Government in some other sense than that they hampered a complete and full investigation.
>
> If the concealed fact were disgraceful or embarrassing or likely to involve some local difficulty in the country or origin, the Courts tended to treat such concealment as no ground for deportation if it were clear that had the concealed fact been disclosed the attitude of the American admitting authority would have been the same. The reason for this attitude is quite obvious. Many persons called upon to disclose their full life, and not certain whether they will be admitted to the United States, may at the time they are appearing before the Consul keep back events or facts which will or might get them into trouble with their relatives or the authorities in the country of their origin. Unless the concealment does real harm to the United States, it is a very harsh rule that provides for the deportation of the alien long after he has been admitted on the ground that he did not make this disclosure. To sanction deportation under these conditions is often (as it may have been in this case) a spur to a malice, envy, spite, or worse motive of someone in the country of origin, who has no other purpose than to cause discomfort to the person newly admitted to the United States and who is not in the least solicitous about the

welfare of this country, but only seeks to impose suffering on the recently admitted immigrant."

We submit that fact that Judge Wyzanski was reversed does not take away the force of the argument suggested by the above quotation.

We respectfully request Your Honors to assume that from the time of arrival up to the time of the issuance of the Certificate of Naturalization, petitioner fully complied with the law, answered all questions truthfully, concealed nothing and made no false representations to any one connected with the Immigration Service. That he appeared before the Naturalization Judge where his petition and affidavits in support thereof, were considered together with testimony taken in open court (Vol. II, p. 2) and he was admitted to citizenship. There is not one scintilla of evidence to show that our supposed state of facts did not exist. On the other hand, there are many facts and circumstances to show that that is probably what happened. The Government proved the case for petitioner, while attempting to establish proof for the plaintiff.

## XI.

**The Examiners who testified did not remember petitioner or the transaction. The Government attempted to prove a false answer as to arrests by certain markings on the papers coupled with proof of custom. This proof was insufficient to warrant the inference drawn here by the Attorneys for the Government.**

As Your Honors study the record, we respectfully suggest the reading of the testimony of Examiner Durisch (Vol. I, p. 86, In narrative form, Vol. I, p. 344), the deposition of Examiner Jordan (Vol. I, p. 262), the examination of Plaintiff's Exhibit No. 3 (Vol. I, p. 314, Vol. II, p.

3) and Plaintiff's Exhibit No. 2 (Vol. I, p. 313, Designated as Exhibit No. 3 in Vol. II, p. 6) being what was termed a Face Brief. Then if Your Honors will examine the footnote to the opinion of the Court of Appeals (Our brief, p. 82, *United States* v. *De Lucia*, 256 F. 2nd 487, 492), one of the fatal gaps in the case for the Government will be observed and understood. The Court of Appeals failed to perceive that in the total absence of testimony concerning what was said by petitioner at the time he was examined, Judge La Buy had no way of knowing what petitioner understood by the question concerning an arrest. If the question referred only to an arrest in this country, or only to his probationary period, his answer was truthful, even assuming that he had had trouble in Italy. If, assuming he had trouble in Italy, and petitioner explained the same to the Examiner and the Examiner considered him eligible, a check mark would have been the result. There is no proof as to what petitioner understood by the questions and absolutely no proof that he did not satisfactorily and truthfully explain any arrest which may have taken place. After Your Honors study the record we are certain that the following which we quote from the above mentioned footnote consists of a misleading half truth:

> "As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant and that the latter's oral answer agreed with that on the preliminary form."

We quote from the testimony of Examiner Durisch (Vol. I, p. 100):

"Mr. Bickley (Assistant United States Attorney): Q. All right sir. Now dropping down to the next line, the statement, 'I was born on,' it is printed, opposite that appears a double check-mark. What reason, if any, was there for putting a double check-mark, black ink check-mark at that particular spot?

Examiner Durisch: A. The applicant was asked, 'Where were you born?' and the answer he gave agreed with the written application.

Q. What answer did he give in this particular case, sir? A. I do not personally remember. * * *

Q. I take it, sir, from each one of your answers as we go down this list where a double check-mark appears in black ink that would indicate to you that you asked the question orally of the applicant and he gave his answer, is that correct? A. Yes.

Q. And the answer that he gave you orally was the same as appeared on that written application, is that correct? A. Yes. We were looking for discrepancies and where the answer would agree with the application and where the same item would appear, the answer had to agree with the Declaration of Intention, or explanation of any discrepancies were needed."

So it follows that if explanations were needed and given to the satisfaction of the examiner the same check mark might result.

This qualification concerning the meaning of the check marks was overlooked by the Court of Appeals.

Although we demonstrate from the record that the courts below were mistaken concerning the value of the evidence given by the Examiners Dursich and Jordan, we respectfully request Your Honors to not lose sight of our contention that the preliminary proceedings, leading up to naturalization, lost significance, by reason of the judgment of the Naturalization Court. The Government proceeded on the charge that misrepresentations and concealments caused

the officials to recommend citizenship and the Naturalization Judge relied upon that recommendation. The judgment of the Naturalization Court (Vol. II, p. 2) destroyed this theory. The Courts below ignored this failure of proof. Judge Finnegan said in *United States* v. *Minnerich*, 250 F. 2nd 721, 732:

> "From all we can find in this record the judge relied on the examiners' report and not upon the petitioner."

In the case at bar we submit that Judge La Buy should have found, or the Court of Appeals should have noticed, that the Naturalization Court did not rely upon any examiners' report, insofar as was shown by the evidence.

We quote from the deposition of Examiner Jordan (Vol. I, p. 278):

> "Miss Martin (Assistant United States Attorney): Q. Referring again to the point in the procedure where the Preliminary Examiner asks the applicant the questions, were there any questions in addition to those on the form which the Preliminary Examiner asked the applicant, on the form which is Exhibit 3?
>
> Examiner Jordan: A. There might be many other questions if it appeared to the examiner that sufficient information was not disclosed on that form.
>
> Q. What was the custom and practice with regard to other questions asked at that time and place? Was there any custom and practice with regard to any particular questions that were asked by the Preliminary Examiner at that time and place?
>
> p. 279. A. As a rule, the petitioners were questioned particularly with reference to residence, family status and employment and possible arrests. The Examiner was not limited to the questions appearing on the forms in making his inquiry.
>
> Q. What questions was it the custom and practice at that time and place for the Preliminary Examiner to ask which were not on the printed form, in addition

to those you have just related? A. Well, that would depend entirely on the individual case and what might be indicated as being important."

Your Honors will perceive that the above is the sort of answer to be expected from a truthful witness. The Examiner functioned with a great deal of discretion. If the Examiner did not believe an arrest prior to the probationary period was important after learning the circumstances and the Examiner believed that "No" was a truthful answer because the applicant explained that he thought the question referred to arrests in the United States the Examiner might very well have noted, "Arr No" on the Face Brief. We continue to quote the record.

Miss Martin: Q. Were there some questions that were always asked and others which might have been asked? In other words, were there some fields or certain subject matter which it was the custom and practice to cover?

Examiner Jordan: A. The practice was to cover any matters that were required by law or regulation.

Q. What do you mean "required by law or regulation"?

A. The law requires the petitioner to meet certain standards and performance, and the regulations, to some extent, expanded the inquirer a little in those respects.

Q. You are referring now to the statute which sets out the requirement for naturalization? A. Yes.

As Your Honors know, the history of Paul De Lucia, even if it were as claimed by the Government, including an arrest and conviction in Italy, would not have disqualified petitioner. It must be remembered that the drive concerning communists was not in progress in 1928. Officials were not afraid to exercise authority and were not so concerned with preparing a record for self protection in the event the exercise of authority was questioned and investigated.

An official may very well have been satisfied that petitioner was in fact qualified. If such was the event, the papers including the abbreviations and hieroglyphics would be the same as those found in this record.

> (p. 286) Q. Were there any other questions which it was the custom and practice to ask the witness at that time and place by the Preliminary Examiners? A. Those were the principal ones. There might be others. That would vary with the individual case, and if it was something that seemed important to appear on the record the Examiner would make notations either on the front of the face brief or on the back.

Your Honors no doubt will take judicial notice of the fact that times have changed. That which an official might believe of sufficient importance to appear on the record in 1928 would be far different than that placed on the record today. If we are to speculate upon what may have occurred from slight circumstances, we must try to imagine conditions as they existed and not use conditions of today as standards. Judge Finnegan in *United States* v. *Minnerich*, 250 F. 2nd 721, 733 said:

> "Today, we must avoid viewing with hostile spirit the silence of Minnerich in 1928."

We continue to quote from the Jordan deposition:

> Q. Was there any particular requirement that the witness was supposed to know or testify to under the statute? A. Yes.
>
> Q. What was that? A. The law required the applicant to produce two citizen witnesses to testify concerning his residence and character for a period of five years preceding the date of the petition. • • •
>
> (292) Q. Was it the custom and practice for the Designated Examiner to interview the applicant and the two witnesses at the same time? A. That's right.
>
> Q. Was there any custom and practice with regard to questions which were asked by the Designated Examiner which might appear on Exhibit 3, the Prelim-

inary Form for Petition? A. The Designated Examiner was not limited in the scope of his questions to the information appearing on the documents you have referred to.

Q. What were his duties? A. To represent the Court in conducting a hearing as to the applicant's qualifications for citizenship.

Q. With regard to Preliminary Form for Petition, Exhibit 3, would any of the check marks with regard to the questions appearing on that form be made by the Designated Examiner according to the customs and practice at that time and place? A. They might be or might not. As a rule, if there were certain questions that he was emphasizing in his own mind, he would probably put his own check mark, regardless of what the Preliminary Examiner had done. * * *

(294) Are there any notations on Exhibit 2 with regard to these particular questions which it was the practice of the Designated Examiner to ask the applicant?

A. No, I don't find any such marks.

Here Examiner Jordan refers to the Face Brief. We submit that the above answers destroy entirely any theory based upon proof of custom or usual procedure. The Designated Examiner left no marks, identified as his. He might or might not have made marks.

Q. Was it a custom and practice of the Designated Examiner to make notations with regard to those questions? A. The only indication that he did make them would be the fact that he had recommended that the petition be granted.

Q. Where is that notation? A. That is the letter "G" under the third column in the block under the word "Adjournments."

Q. That is the customary notation when the Designated Examiner recommended grant? A. That's right. * * *

From the evidence all we know for certain is that the G and initials G.M. are in the handwriting of Designated Examiner McKay. When or where these were placed we do not know. Insofar as the evidence shows the fact, Mr. McKay may never have seen petitioner or his witnesses. That which caused Mr. McKay to place the G on the Face Brief is unknown. The Government Attorneys would like to have us guess that the G was placed there because of false representations made by petitioner, but there is no such proof. Judge La Buy drew the inference from the testimony of Examiners Durisch and Jordan (Vol. I, p. 335, 163 F. Supp. 36, 41) that petitioner had not disclosed all the facts material to the Designated Examiner and that such failure foreclosed further inquiry. We have no way of knowing what inquiry was made or that the officials desired or required any further information than that received. We do not know what information they had. We quote further from the deposition.

> (297) Miss Martin: Q. In other words, if in answer to the question of whether there had been arrests there was an indication of some arrest an additional investigation might have been requested?
>
> Examiner Jordan: A. It might have been, yes.
>
> Q. Tell us what the practice and procedure was. Would there always be an investigation under such circumstances?
>
> A. It would depend on the circumstances and the apparent seriousness of the offense and the time at which the offense had been committed.

We respectfully submit that the above questions and answers alone should have been enough to destroy any inference to be drawn from the markings, lack of marks, custom or usual procedure. If the circumstances, including the matter of seriousness and the time of an offense, prompted an examiner to approve an application, with no

desire for further investigation, how can it be said that an investigation had been foreclosed or thwarted?

We respectfully submit that after Your Honors consider the testimony of Examiner Durisch and Jordan and note the absence of Examiner McKay, it will appear that the so-called custom was quite flexible. A great deal was left to the discretion of the Examiners. It should be obvious that the examination of papers marked thirty years ago, by persons shown to have examined thousands, Examiners who had no recollection of this petitioner, failed to supply clear proof of any misrepresentation, concealment or fraud.

We now quote from Judge La Buy, (Vol. I, p. 335, 163 F. Supp. 36, 41) with the respectful suggestion that the conclusion of the District Court was not warranted by the testimony.

> "Stephen Durisch and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who serve on occasion as Designated Examiner, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul De Lucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

If Judge La Buy had omitted the above from the opinion, there may have been room for the argument that there exists a presumption that the trial judge gave no heed to the evidence of custom. But as Your Honors perceive, Judge La Buy based the decree squarely on the proof of custom. In fact the Trial Judge was compelled either to

do this, or enter judgment for petitioner. There was no other evidence upon which to base the above conclusion. Your Honors will find in 5 C. J. S. § 1564 (5), p. 1275, authorities in support of the following:

> "The presumption that the trial court considered only proper and admissible evidence in making its findings, however, is qualified by the conditions that the contrary must not clearly appear, that there be nothing substantial in the record to indicate the contrary, and that the presumption is unavailable where it is obvious that the court considered the improper evidence and that it influenced its decision, or that the findings were not based on proper and admissible evidence."

Now that we have called the attention of Your Honors to this branch of the evidence we respectfully request Your Honors to again read footnote 4 appended to the opinion of the Court of Appeals (p. 82, Footnote 3, 256 F. 2nd 487, 492). We respectfully submit the testimony omitted from this footnote spells the difference between an inference to be drawn and a speculation or a guess.

In *Cafari v. United States*, 217 F. 2nd 404, after stating that the Government offered to prove custom, which offer was rejected, Judge Woodbury said, p. 406:

> "The District Court rejected this offer of proof on two grounds. It said it was of the opinion that the evidence offered was legally insufficient to establish the Government's case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt, and furthermore, that it would not find such evidence persuasive even though it were legally admissible."

We copy the footnote written by Judge Woodbury, p. 407:

> "Although we do not question the probative value in some situations of evidence of a person's habitual or customary conduct as showing the conduct of that

person on a particular occasion (see 1 Wigmore on Evidence (3rd Ed. 1940) §§92, 93) we agree with the District Court's ruling excluding such evidence in the situation presented in this case. We therefore reject the Government's suggestion that in the event of our disagreement with the District Court's conclusion we should remand the case for a new trial in order that evidence of the custom and practice of the Examiners involved might be considered."

In the case at bar, the Court of Appeals refused to reject findings of the District Judge based upon proof of custom. This conflict in decisions, if permitted to stand is bound to create confusion. In many pending cases the question no doubt will arise in the future. The various published opinions show that this reliance upon proof of custom has often been had. After an order granting citizenship has been on the books for about 30 years, it is to be expected that the examiners may have passed on, or those surviving may not remember a particular applicant. In the case at bar, this Honorable Court is requested to decide if proof of custom such as this should be permitted to take the place of evidence. If Your Honors will compare the testimony of Examiner Durisch with that of Examiner Jordan it will be seen that there was no uniform custom. Even if the evidence should show a custom the same evidence shows that the custom can be disregarded at times. Also the evidence shows that the custom itself allowed latitude to the Examiners in such manner that a check mark means nothing further than that the question was asked and the Examiner was satisfied with the answer or explanation.

Here again with all due respect we submit that Judge La Buy failed to properly appraise the evidence. To put the above in another way, Judge La Buy has here held

that the testimony of Examiners Durisch and Jordan show that the defendant had not disclosed to Designated Examiner McKay all material facts. Such performance was impossible on the part of witnesses who did not remember the defendant or the occasion and were not present when Mr. McKay acted. Particularly where the record shows nothing done by Mr. McKay other than the placing of his initials with the letter G. Examiners Durisch and Jordan did not know whether Designated Examiner McKay ever asked petitioner anything. On the other hand, Mr. McKay may have made a full investigation based upon full and truthful information furnished by petitioner.

Your Honors will note that the Court of Appeals treated our objection as if we were merely objecting to the admissibility of the papers. We quote (p. 81, 256 F. 2nd 487, 491):

> "Again, he (De Lucia) states in Proposition of Law VII, the following: 'It was error for the Trial Court to allow evidence of custom and to give same probative value'. * * *
>
> "We construe De Lucia's contention that it was error 'to allow evidence of custom' to mean that the evidence of custom in this case was inadmissible because it was incompetent."

Even if Your Honors accept the construction placed by the Court of Appeals on our Proposition VII, (which we respectfully dispute) Your Honors will note that the Court of Appeals construed only the first half of Proposition VII. The second half was left with no further mention. No doubt, by approving the findings of the Trial Judge, the Court of Appeals is to be understood as having decided against petitioner also as to the second half. The second half may be re-stated as follows:

It was error for the Trial Court to give to the evidence of custom probative value.

We are unable to see any need to quibble over the fine point drawn relative to admissibility of exhibits. They were admitted. De Lucia demurred to all of the evidence including the exhibits. The position of De Lucia in all courts must surely be clear from the record. This position invited Judge La Buy to view the evidence in the most favorable light for the Government. Still the evidence is insufficient. The Court of Appeals distinguishes *Cufari* on the ground that Cufari testified and De Lucia did not. This alone, we respectfully submit, should demonstrate that the Court of Appeals failed to appreciate the force of the second half of our Proposition VII.

Even in an ordinary civil case findings which are the product of legal reasoning are free from the restraint of the clearly erroneous rule. *Thomas* v. *Commissioner*, 254 F. 2nd 233, 236.

## XII.

**The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.**

We have copied the above heading from our opening brief (p. 59). The reason we repeat it here is to point out that instead of any comment concerning the failure of Judge La Buy to make these findings, our opponents say (p. 9):

> "The courts noted further that concealment of a criminal record is grounds for refusing or cancelling naturalization."

The courts below noted that concealment of a criminal record is grounds for cancellation of a naturalization certificate (Vol. I, p. 333, 163 F. Supp. 36, 40, Pet. p. 80, 256 F. 2nd 487, 490). Our opponents here have added that such concealment is ground for refusing naturalization. We mention this because we do not wish to lose sight of the law which makes a difference in the burden of proof between refusing and cancelling. Before we reached this Honorable Court, the prosecutor and the courts below, in spite of anything we could do, insisted on mixing cases involving application for citizenship with denaturalization cases. Both of these were mixed with cases involving the deportation of aliens. Now we find our opponents here following the same plan. We trust that Your Honors will see the difference. We feel like apologizing for calling attention to the need of making such a simple easy distinction.

Here the Attorneys for the Government, in support of that above quoted assertion, cite the same cases cited by the courts below. Your Honors will note that in our brief (p. 59), we took up each of these cases in detail in order to show that it was a mistake to rely upon them under the facts in the case at bar. Our opponents have seen fit to ignore our endeavor to demonstrate that the courts below were misguided.

Your Honors will observe that our opponents blow hot and cold. Having to meet our claim that Judge La Buy had placed in the scales against petitioner his refusal to answer questions in pre-trial, our opponents argue that (p. 10):

> "While noting petitioner's failure to testify at the pre-trial deposition in its preliminary statement of the case (R. I. 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, • • •"

In other words, the Attorneys for the Government argue that the pre-trial incident was merely noted and not applied. Then when they come to consider our claim that Judge La Buy merely noted some law in reference to concealment of a criminal record, without explanation of its application, our opponents assume that that law had been applied to the detriment of petitioner. The trouble the Attorneys for the Government find themselves in springs from the ambiguity of the findings concerning some of the vital links in the chain. We respectfully submit that Judge La Buy did not just throw in some cases on concealment without some effort to connect them with the case at bar. The Judge was unable to set out the manner in which the cases applied, because there was no such evidence. The Court of Appeals, we respectfully submit, should have given heed to the situation created. As it is, Your Honors are requested to review haphazard findings, with no assistance of any value from the courts below or from the Government Attorneys here.

## XIII.

**In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.**

The Complaint (Vol. I, p. 4) alleges:

> "6. That in the proceedings which led up to his naturalization, the said Paul De Lucia formerly known as Felice De Lucia, alleged under oath: * * * c. * * * and further alleged under oath that he had never been arrested."

Now that Your Honors are familiar with the record, Your Honors know that there is no proof that De Lucia ever swore that he had never been arrested. The Preliminary

Form, Exhibit No. 2 (Vol. I, p. 313, Vol. II, p. 3) was not made under oath. Examiner Durisch (Vol. I, p. 86) testified to a custom and said that it was regular practice to swear an applicant and take him orally over the same ground, but we have no way of knowing what petitioner may have said concerning an arrest while under oath before Mr. Durisch.

Now if Your Honors will search the Complaint it will be found that the only allegation concerning the result of false and fraudulent representation concerning arrest is to be found in paragraph 8 (Vol. I, p. 5) wherein it is pleaded that these falsehoods were relied upon to cause the issuance of a Certificate of Arrival. The Certificate of Arrival (Exhibit No. 1, Vol. II, p. 1) was issued as a matter of routine. There is not a line of evidence to show what the officers issuing the certificate relied upon. Most likely they consulted the records at the point of entry. This certificate was issued, attached to the Declaration of Intention and filed, long before the Preliminary Form was signed, long before De Lucia saw Examiners Durisch, McKay, and Jordan.

We respectfully quote another heading from our first brief (p. 30).

## XIV.

**The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed admonishments of this Honorable Court.**

In this reply as we have endeavored to follow and answer the Brief for the Opposition it may have appeared that we were joining our opponents in treating this as an ordinary civil case. If so, that was only for the purpose of argument. We trust that Your Honors will agree that

petitioner has a right to a re-examination here, notwithstanding the following, said by the Court of Appeals. (p. 80, 256 F. 2nd 487, 490):

> "From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and therefore, we are bound by those findings."

It is to be noted that the Court of Appeals did not say that that Honorable Court was bound until it was said that the record had been examined. The Court of Appeals also noted that Your Honors in *Schneiderman* v. *United States,* 320 U.S. 118, 123, held that the burden must be met with evidence of clear and convincing character. We quote from the Brief in Opposition (p. 9):

> "The Court of Appeals examined the record and found the district court's findings to be fully supported by the evidence and its conclusions of law amply supported by the federal cases.
>
> "These conclusions of both courts below are required by logic and law."

We respectfully pray that Your Honors will not accept such assertions without a careful re-examination. In making that re-examination, please keep in mind that petitioner demurred to the evidence put in by the Government. Your Honors need not be concerned with the matter of credibility. Petitioner took the position that, assuming the testimony to be true and drawing reasonable inferences, the Government has not met its burden of proof. It is true generally that where there is a direct conflict of testimony on a matter of fact, the question must be left to the trial judge to determine. But here there is no conflict in the testimony as to the *facts*. There being several inferences deductible from the facts which appear and equally

consistent with all of the facts, the Government has not maintained the proposition upon which alone plaintiff would be entitled to a decree.

In *United States* v. *Minnerich*, 250 F. 2d 721, 726, Judge Finnegan held that Rule 52, 28 U.S.C.A. must require a different reading than usual and said:

> "Following the clear direction of *Schneiderman*, *Klapprott*, and *Knauer*, we made an independent appraisal of the plaintiff's evidence presented on the issues of fraud and misrepresentation and found that the government's proof failed."

If the same Court of Appeals made an independent appraisal in the case at bar, that Honorable Court did not say so. We quoted from *Minnerich* in our opening brief, p. 32 concerning the meaning of § 340 (a). *Minnerich* was decided about six months before the opinion was filed in the case at bar. It is difficult to understand why *Minnerich* was not mentioned in the opinion rendered in the case at bar. The two cases seem to express conflicting view points in the same circuit. If the rule be that the last opinion in time prevails, we respectfully submit that Your Honors should not permit it to stand.

## XV.

**The order of naturalization entered in 1928 is res judicata. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree.**

The above is a repetition of one of the headings in our opening brief (p. 34). We quote all that was said in the Brief for the Opposition (p. 10):

> "2. There is therefore no merit to petitioner's assertion that his order of naturalization is *res judi-*

*cata* even though it was obtained by misrepresentations and concealment of material facts. The very decision which he cites in support of this theory is conclusive authority for the fact that Congress has the power to provide for the revocation of naturalization on the ground of fraud. *Knauer* v. *United States*, 328 U.S. 654, 673."

In our opening brief we referred to *Knauer* in two places, here is the first, p. 30:

> "After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your Honors will re-examine the record to determine if mistakes have been made."

Although our opponents made no reference to this duty imposed by Your Honors on this Honorable Court, we assume that the practice can not be questioned.

In the second place, where we quote from *Knauer*, p. 36, we do so in order to point out the care taken by Mr. Justice Douglas to distinguish *United States* v. *Throckmorton*, 98 U.S. 61, 66. Either our opponents did not read our brief very carefully, or they seek to fuzz it up some more. We believed that *Knauer* shows rather plainly that the point we make in our case has not been squarely decided by Your Honors. We again quote from Mr. Justice Douglas, p. 670:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—to behavior and conduct."

As we understand that said by Mr. Justice Douglas, it is indicated that a case such as the one at bar would come within the rule announced in *Throckmorton*.

We shall not repeat any more of our argument under this head, but we do respectfully present a short reply to the above quoted assertion made by the Attorneys for the Government.

Our opponents have erected a man of straw. We did not claim that Congress had no power to provide for the revocation of citizenship by misrepresentation and concealment of material facts, provided the statute is properly construed and applied. *Knauer* does seem to suggest limitations on the power of Congress.

In *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, Your Honors pointed out the difference between *res judicata* and collateral estoppel. In the case at bar, we submit, the distinction does not matter. Proof of good character, legal residence, lawful entry, etc., was in issue upon determination of which the finding and judgment was rendered. In *Sunnen*, Your Honors also mentioned the familiar rule that the parties are bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

## XVI.

### Some of our reasons for presenting this reply brief.

We note that Mr. Frederick Bernays Weiner in his book, *Effective Appellate Advocacy* advises a reply brief (p. 169):

> "(b) When the other side fuzzes up the issues, and you can reclarify the discussion by filing a short reply brief, it may well be helpful to do so."

One not familiar with the record, in the absence of a careful study of our petition and brief, might be deluded into the belief that the Government Attorneys had made

a fair statement of the case and a proper argument. An example of the manner in which the other side fuzzed up the issues is to be found in the following which we quote from the *Statement* presented here by the Government (p. 6):

> "The government proved further, by documentary evidence, that one Felice De Lucia was born in Naples, Italy, on November 14, 1897, the son of Antonio and Maria Annunziata (R. II, 11). Felice had four sisters, Emilia, Anna, Clementina and Luisa (R. II, 15). Felice De Lucia was convicted in Italy of voluntary homicide in 1917 (R. II, 18) and again, *in absentia*, in 1924, for the voluntary homicide committed in 1920 (R. II, 26)."

This statement would lead one not familiar with the record, to believe that there was *proof* that the convicted Felice De Lucia was in fact petitioner. There was no such proof. As we have pointed out, Judge La Buy refused to base inference on inference. The District Court did not find that petitioner had been convicted in Italy. No evidence was produced to show that the Felice De Lucia named in the foreign documents was in fact petitioner. No one identified the De Lucia on trial before Judge La Buy as having been convicted in Italy. (Our Brief, p. 17)

Another example of fuzzing is to be found in the following quotation from the Government brief (p. 8), which we have already noticed:

> "The Government proved that petitioner is the same Paul De Lucia who, in applying for entry and naturalization, asserted that his true name was Paul Maglio and that he had never been convicted of crime."

All of the representatives of the Government, commencing with the one who drew the complaint have used phrases like

"in applying for entry and naturalization".

The evidence having been heard, it really should be time for a little more care. There is not a scintilla of evidence to show that in his application for entry petitioner asserted that he had never been convicted of crime. There is no proof at all about what he may have asserted at the time of entry. When petitioner applied for naturalization his name was Paul Maglio. That is what he said and there is no evidence to show that it was not. We have already replied to the claim that the Government proved that in applying for naturalization, petitioner asserted that he had never been arrested.

In our opening brief (p. 57), we argued concerning the name. Now that Your Honors are more familiar with the record, it will be observed that there is no representation as to true name to be found in the Declaration of Intention (Vol. II, p. 1), or in the Petition for Naturalization (Vol. I, p. 320). The true name declaration is to be found in the Preliminary Form (Vol. I, p. 313, Vol. II, p. 3). This was, no doubt, talked over in subsequent conversations. In any event, there is no evidence that this Preliminary Form was ever exhibited to the Naturalization Judge. There is no proof that petitioner ever asserted that he had never been convicted of crime. Judge La Buy as we have said, did not find petitioner had ever asserted that he had never been convicted of crime. Judge La Buy did not find that petitioner ever asserted that he had never been arrested.

In giving these examples of fuzzing, we repeat another quote from the Government brief (p. 8), already noticed:

> "The court found that petitioner was the 'Paul De Lucia' who had falsely assumed the identity of 'Paul Maglio' for purposes of entry and naturalization and that petitioner was in fact 'Felice De Lucia' who had a criminal record."

Anyone not familiar with the record would understand that Judge La Buy found as a fact that petitioner was the Felice De Lucia convicted in Italy. As we have said, there is no such finding. As we have said, there was no proof concerning the entry, other than the ship record and the certificate of arrival. If petitioner said anything to the officials, true or false, at the port of entry, the record does not show it. We trust that Your Honors will not mind our repetition of some of these absent links in the chain of proof. It will be remembered, we hope in extenuation, that we have been unable to induce the courts below to take these gaps into consideration. Now, after our opening brief points out the lack of evidence our opponents nonchalantly assume that proof of these missing links have been made.

We again quote from the Government brief (p. 9):

> "In the light of its findings and the case law, it relied upon to reach its conclusions, it is obvious, as the Court of Appeals observed, that these 'other material facts' had reference to petitioner's criminal record."

Here again, the Government Attorneys fuzz it up by assuming that petitioner had a criminal record. The ultimate in fuzzing is attained when it is realized that all of this fuss about a possible conviction in Italy is really immaterial, if the real issues be understood. Our brief (p. 34), points up the real issue, *i.e.*, the effect to be given to the judgment.

As a further example of fuzzing, we quote the following from the Government Brief (p. 10):

> "In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested."

As we have said, there is no proof that De Lucia concealed anything, hindered investigation or made a false assertion.

We quote further from the Government brief (p. 10):

> "The government proved wilful misrepresentation and concealment of material facts, or, in the terminology of the prior statute, 'fraud'."

We respectfully submit that if instead of the above baseless conclusion, the Government Attorneys had paid more attention to answering the questions asked by us in our brief (p. 40), perhaps this reply brief would have been deemed unnecessary. Surely some effort on the part of our opponents to answer these questions would have been helpful to this Honorable Court. It is not our province to suggest to the Government Attorneys the manner in which their brief should have been prepared. It must be obvious that their tactics have given us alarm. We hope our fears will prove unfounded, but it should be remembered that we failed in our effort to cause the Court of Appeals to perceive that there existed no evidence upon which to base a finding that petitioner had hindered an investigation, or that he had made a false assertion that he had never been arrested. We respectfully endeavor to demonstrate that our failure was not because of the existence of evidence said by us not to be in the record.

We quote only a portion of the questions posed in our opening brief, p. 40:

> "(a) What concealments were made?
>
> (b) What misrepresentations were made?
>
> (c) To whom were they made?
>
> (d) How did their making result in the entry of the order of naturalization?"

Our opponents having chosen to ignore these questions, we respectfully request Your Honors to be on the lookout for possible answers as this record is being re-examined here. It will be found that there was absolutely no proof of concealments. No proof of misrepresentations. Judge La Buy did not find specifically that there had been concealment. The "concealment of other material facts" (163 F. Supp. 36, 41) was extended by the Court of Appeals to "failure to reveal convictions" (256 F. 2nd 487, 498). But the Court of Appeals does not undertake to say where and when this failure to reveal took place. Perhaps if the Court of Appeals had looked to the record in order to locate "where or when" it would have been seen that there were no concealments of other material facts.

We quote from:

**United States v. Nechman, 183 F. 788.**

"His certificate of naturalization recites that:

'It appearing to the court that he had made his declaration of intention to become a citizen of the United States, according to law.'"

"'This can have but one meaning. All other requirements of the law necessary to sustain his application for naturalization, as the law then stood, are found by the court and recited in its certificate. There is an entire absence of testimony that any fraud was perpetrated upon the court, or that there was any illegality committed by which Nechman's certificate was procured. There is, therefore, nothing in section 15 of the statute of 1906 which would warrant this court in cancelling his certificate. The facts were all directly before the court and it passed its judgment upon them.' 'The judgments of courts may not be impeached for any facts, whether involving

fraud or collusion, or not, or even perjury, which were necessarily before the court and passed on.'" (Citing cases.)

We quote from the complaint in the case at bar (Vol. I, p. 6):

"9. That the concealments and misrepresentations of the said Paul De Lucia in paragraph 1 (b) heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States.

10. That the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States; to prevent the making of a full and proper investigation of his qualifications for citizenship; to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts; to make the unconditional recommendation to the court that his petition for naturalization be granted and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law.

11. That the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above."

Now that the evidence is before Your Honors this Honorable Court might eliminate and disregard the charge where ever it is said that any misrepresentation was made in order to deceive the court, or to preclude inquiry by the court concerning the qualifications and eligibility of peti-

tioner. The judgment order shows that the court did hear further testimony. Just how much inquiry was made does not appear. The necessary findings were made. The extent of the inquiry was left to the discretion of the Naturalization Judge. There is no showing that the court was deceived. There was no evidence upon which to base a conclusion that concealments and misrepresentations had been made in the proceedings leading up to naturalization.

As we have said, Judge La Buy failed to give to the judgment the force to which petitioner was entitled. Judge La Buy erroneously allowed the Government to endeavor to contradict the specific findings of the judgment by oral testimony concerning an alleged custom existing among Naturalization Examiners.

If in fact the Examiner recommended the petitioner, the record indicates that the Naturalization Judge did not rely entirely upon the recommendation. There is no evidence that the Naturalization Court was even informed of any recommendation. The Court looked into the matter of qualifications and determined that all required procedure had been taken.

Now all we need do is to point out to Your Honors that without evidence from McKay, or its equivalent, there is no case. The Trial Judge overlooked the vital point that unless Examiner McKay or Examiner Jordan was deceived by the defendant on some material matter, the Government has no case based upon its own theory. Examiner Jordan gave no testimony from which it could be inferred that he had been deceived.

Without the testimony of McKay, Your Honors cannot know what he may have learned or what influenced him to recommend the defendant, assuming for the sake of argument that Mr. McKay did recommend. All we can learn from the evidence is that Mr. McKay was the Designated Examiner in this case.

Examiner Jordan knew from discovering his initial on the Face Brief (Ex. 3, Vol. II, p. 6) that he, Mr. Jordan, had taken this defendant, with others, before the naturalization Judge.

We quote further from the deposition given by Mr. Jordan (Vol. I, p. 269):

> "Miss Martin: Q. Can you tell us in what capacity your signature appears on this document? In what capacity were you acting when you placed your signature on there?
>
> Examiner Jordan: A. I was acting as the representative of the United States Government who presented the case to the Court for final admission; or the word 'Final' would probably be superfluous there.
>
> Q. Does it show on the face of this document whose petition for naturalization was under consideration?
>
> A. Yes.
>
> Q. Do you know what that was?
>
> A. Only what I read on the form now.
>
> Q. You do not recall the person?
>
> A. I do not."

It appears that Mr. Jordan (Vol. I, p. 269) acted for the Government before the naturalization Judge. Examiner Jordan did not remember the person. The United States Attorney did not ask him if he had talked to petitioner or if he had examined any report made by Mr. McKay or any other papers on records. This line of questioning was not followed up no doubt because Mr. Jordan said he knew only that which he read on the form called a Face Brief. That amounts to nothing. There is no writing on the face brief or any other paper to give any hint of what may have been asked of De Lucia by Mr. McKay. It is true that Mr. Jordan did not remember this case but that alone does not excuse the questioner from at least trying to find out from him what really happened. He was not asked what the practice would be if for any reason

a Designated Examiner could not carry on through and take a petitioner to court. It is reasonable to assume that this was not the only time that an Examiner who took part in a case was unable to appear after the 90 days and another Examiner took over. *Cf. Alexious* v. *Rogers*, 254 F. 2nd 782, 785. Did the next man like Mr. Jordan merely look at the face brief, observe the "G" and carry on without learning what had been done by the previous examiner. Did Mr. Jordan make any effort to learn whether the answer, "No" to arrests, meant arrests in this country? Did Mr. Jordan make any effort to learn why petitioner used one name in his Declaration of Intention and desired to legally change that name as prayed in his Petition?

Examiner Jordan said further (Vol. I, p. 303):

> "A. As a general rule. Although, I must state for the record that occasionally there might be one or two cases that would not require more than a very few minutes of the Court's time that would be held until after the group had been admitted, then they would be presented to the Court."

In the year 1928 inquiry about arrests in the course of the naturalization process was not required, either by statute or departmental recommendation. (*Cufari* v. *United States*, 217 F. 2d 404, 409)

There is no evidence that Designated Examiner McKay ever looked at the preliminary form or gave any heed to the matter of arrests. Mr. Durisch said it was the custom to send the Face Brief (Exhibit 3, Vol. II, p. 6) along to the Designated Examiner. Mr. Durisch and Mr. Jordan identified the initials G.M. on the face brief as having put on there by Designated Examiner McKay. If Mr. McKay examined the face brief and observed the code mark "no arr" and understood, either with or without inquiry, that notation to mean no arrests in this country within the

five year period, there surely had been no deception of Mr. McKay. It is very probable that the five year period was all Mr. McKay was interested in. *Cf. Baghdasarian* v. *United States*, 220 F. 2nd 677, 680.

In an effort to make an intelligent guess as to what was of interest to Designated Examiner McKay, Your Honors might consult *Application of Murra*, 178 F. 2d 670 where it was held that facts developed by an inquiry concerning a petitioner for naturalization previous to the five year period cannot be used as the basis for disqualification. (The statute has been amended since 1928.) *Cf. Marcantonio* v. *United States*, 185 F. 2d 934, 937.

Even if Judge LaBuy had jurisdiction to look for fraud in the making of the preliminary papers, which did not affect the jurisdiction of the Naturalization Court, the Government would be required to show that the defendant wilfully lied. If in fact petitioner understood or was informed that the question was directed to arrests in the United States he may have been mistaken, but he did not falsify. *Cf. United States* v. *Kessler*, 213 F. 2d 53, *United States* v. *Minnerich*, 250 F. 2d 721.

Mr. Durisch did not say anything about what he understood the question to mean at the time. If in fact Mr. Durisch understood the question to mean, have you ever been arrested since your birth, either in this country or in the old country, it would have been his duty to explain that construction to the immigrant. On its face the question is open to more than one construction. In the absence of testimony, Your Honors are required to assume the innocent version, in view of the burden on the Government to prove fraud, including a wilful intention to deceive. Fraud is not presumed, on the contrary the presumption is always against fraud. (Authorities collected in 31 C.J.S.

p. 747, § 126) Examiner Durisch did not claim to have been deceived, nor did Designated Examiner Jordan.

In *Re Jow Gin*, 175 F. 2d 299 matters such as those alleged in the case at bar, upon which any proof was introduced and claimed to have been fraudulent, are held not to be jurisdictional. At most they touch on the question as to whether petitioner met the statutory requirements as to character, residence, entry etc. These questions were for the Naturalization Judge and within his jurisdiction. The Naturalization Judge, upon testimony produced in open court, decided these questions in favor of petitioner. That should end the matter. Judge La Buy was without jurisdiction to vacate that valid judgment, on the grounds stated by the District Court.

The actual court order should surely settle any uncertainty. Judge Major in the case of *In Re Jow Gin*, 175 F. 2d 299 reviews some of the statute. Your Honors will note that the statute requires the report of the Designated Examiner to be in writing. In the absence of the production of such a report in the case at bar, Your Honors might assume that the procedure of merely putting the application through on the report of the Designated Examiner was not adopted. Or it might just as well be assumed that back in 1928 the officials did not follow the statute. If they disregarded the statute, it is fair to say that they often violated the regulations and deviated in some cases from the usual procedure. Here again we pursue the theory of the Government for the sake of argument. Your Honors well know that Judge La Buy had no legal right or jurisdiction to ignore the order of the Naturalization Court. We quote from *In Re Jow Gin*, p. 302:

"(4) Sec. 734(a) provides that 'every final hearing' shall be had in open court and that at such 'final hearing' the witnesses shall be examined under oath before the court and in the presence of the court, except that this requirement is dispensed with by Par. (b) of the same section in any case where a designated examiner has conducted the preliminary hearing authorized by subsection (a) of section 733.' It is further provided, however, in the same paragraph that even though a Designated Examiner has conducted the preliminary hearing, 'the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.' As we said in the *Mwra* case, 166 F. 2d at page 606:

> 'It thus appears that there are two ways in which a petition for naturalization may be disposed of: (1) the court may act upon the report of an Examiner who has conducted a preliminary hearing and who is required to make findings upon which his recommendation is predicated; and (2) a hearing in open court where the witnesses must be examined before the court and in the presence of the court.'

"In the cases of the former class, the statute contemplates that the court act upon the findings and recommendations of the Examiner and is not required to make findings of his own, while in the cases of the latter class, the court hears witnesses, examined in open court, and must make findings as to the facts thus disclosed. As already shown, if either the petitioner or the court is not satisfied with the findings of the Examiner a hearing may be ordered in the discretion of the court and must be ordered upon demand of the petitioner. The language which Congress has employed is, in our judgment, not reasonably susceptible of a different interpretation."

Then Judge Major quotes from a previous opinion in the same case as follows, p. 301:

"Under those circumstances we said 166 F. 2d page 607:

> "Thus the hearing before the court is not for the purpose of reviewing the recommendations of the examiner, it is a hearing *de novo* and it is obvious that the court must decide the issues upon the testimony which it hears, and that neither the testimony heard by the Examiner, his findings nor his recommendation are of any consequence."

In the case at bar it appears that Judge La Buy, instead of giving heed to the law as explained by Judge Major, adopted the theory of the Government. Judge La Buy gave no weight to the order entered by the Naturalization Court or to the recitals in the Certificate. Judge La Buy paid no attention to the fact that the Government failed to produce the written recommendation or report of the Designated Examiner, or the failure of the Government to offer any explanation as to why such evidence was not produced. Judge La Buy gave no heed to the fact that the Government failed to produce or account for other records and writings which may have shed light on what took place before the Naturalization Court. We repeat that said by Judge Finnegan in *Penn-Texas Corporation* v. *Morse*, 242 F. 2nd 243, 248

> "These plaintiffs cannot select what they will reveal and then expect equitable relief. Strategy has its uses but full disclosure would have been more suitable before the chancellor below."

We note that Mr. Weiner, in giving advice in his book (p. 296), on the *Basic Approach of a Brief in Opposition*, states that the brief writer frequently can not afford to meet an issue head on. In the case at bar, it appears that the Government Attorneys have steered clear of many of the issues by avoiding mention of them. Although this is not a criminal case, Your Honors have indicated many principles applicable to such cases as this.

Instead of answering these questions, our opponents have made general statements concerning concealments and misrepresentations, without further specification. This shot gun attack is not new to the case, we respectfully submit that the record shows that both lower courts succumbed to the insistence of the United States Attorney that the Government had proven its case. Petitioner was caught in a drag net.

Another example of fuzzing is to be found in the following quotation from the Government Brief (p. 10):

> "The record shows, however, that the court's findings were based strictly upon the documented evidence."

This is not true. Anyone familiar with the record will know that the documented evidence left gaps in the proof; gaps which were never filled. By way of illustration, we again refer Your Honors to the foreign documents purporting to show convictions. They were dumped into the case without a scintilla of evidence to prove that they related to petitioner. Concerning other written evidence, the so-called Face Brief (Exhibit No. 3, Vol. II, p. 6), is largely unintelligible. The Preliminary Form (Exhibit No. 2, Vol. I, p. 313, Vol. II, p. 3), means nothing standing alone. The Declaration of Intention (Vol. II, p. 8), the Petition for Naturalization (Vol. I, p. 1), and the Certificate of Arrival (Vol. II, p. 8), help to establish proof citizenship.

The most important bit of documentary evidence which the prosecutors ignore and to which the courts below gave no heed consists of the judgment (Vol. II, p. 2), as follows:

**Order of Court Admitting Petitioner.**

> "Upon consideration of the petition of Paul Maglio and affidavits in support thereof, and further testimony taken in open Court it is ordered that said peti-

tioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America this Sept. 27, 1928.

It is further ordered upon consideration of the said Paul Maglio that his name be, and hereby is, changed to Paul De Lucia under authority of the provisions of Section 6 of the Act approved June 29, 1906 (34 Stat. L. pt. 1, p. 596) as amended by the Act approved March 4, 1913, entitled 'An Act to create a Department of Labor.'

Certificate of Naturalization No. 28277322 issued on Sept. 27, 1928."

Another important bit of documentary evidence ignored up to now is to be found in the recitals of the Certificate of Naturalization (Exhibit No. 5, Vol. II, p. 9, Vol. I, p. 324), which recites that the court found that petitioner:

"* * * had in all respect complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America. * * *"

In view of that quoted by Your Honors from previous cases in *Jencks* v. *United States*, 353 U.S. 657, 668 *i.e.*,

"For the interest of the United States in a criminal prosecution—is not that it shall win a case but that justice shall be done."

we trust that the Government Attorneys, in the case at bar, have not intentionally adopted the tactics suggested and advised by Mr. Weiner, *i.e.*, to give the interesting issues but a glancing blow. We regret that the Attorneys for the Government did not see fit to meet the issues head on, that they avoided many of the interesting questions presented. We trust that Your Honors will deem it proper to issue the writ of certiorari. Once that bridge is crossed, we are quite certain evasive tactics will be abandoned as a

matter of sound policy, if for no other reason. Mr. Weiner has also said (p. 296) that a brief in opposition is significant only in border line cases; further that most petitions are self denying, even if nothing were filed. We respectfully submit that this is not a border line case, important questions have been submitted. We hope that the Brief in Opposition has not veiled or confused the real issues to the extent that Your Honors obtained the impression that this is a border line case.

Concerning the length of our briefs, we beg the indulgence of this Honorable Court with a reminder that we deal with a circumstantial evidence case. Our claim that there is no evidence as to some vital links in the chain and that unfounded inferences have been drawn, requires us to survey the entire record. The Government Attorneys have said (p. 7):

> "(1). Much of the remainder of petitioner's prolix argument is a series of disjointed attacks on the court's findings of fact and its conclusions of law.[3]

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[3]He makes general assertions, for example, that the evidence is insufficient to support the findings and the findings insufficient to support the decree (Pet. 30); that it is impossible to ascertain either the underlying facts upon which the District Court relied or the findings upon which the Court of Appeals affirmed (Pet. 32); that the District Court made immaterial findings which confused the issue (Pet. 35, 36) and findings contrary to facts (Pet. 57); that the Court of Appeals failed to re-examine the findings and improperly added findings of its own (Pet. 51, 54); and that the District Court's conclusions of law were not applicable to his case (Pet. 55, 59)."

We respectfully dispute the charge that we have relied upon mere general charges without specification. We are sorry to learn that our opponents found our argument to be

tedious. It is possible that the monotony and dullness found by them caused them to lose interest. That would be one way to account for the inaccuracies here pointed out. Our concern is with what Your Honors are able to make out from what we have been trying to convey. Concerning the above list of examples designated as general assertions, we respectfully reply by stating that this list contains some of our points. Further, that our opponents have left many of them unanswered. We wonder, does the above footnote mean that we had no right to make such points? If so, the answer is to be found in *Schneiderman* and such cases cited in our opening brief, (p. 30). We did make an effort to keep our brief short (without much in the way of accomplishment). The mere accusation that we have merely made general charges has caused us to worry a bit. Our opponents have put us to the choice between the risk that Your Honors might possibly agree and this rather lengthy reply, designed to supply further detail.

We wrote our opening brief in the hope that we would be able to state enough of the record and the questions presented to show merit for the issuance of the writ. We withheld some of the details of our argument to be presented in the main brief. Upon receipt of the Government Brief, we ran scared. After all, the Attorneys for the Government have long experience with representation before Your Honors. No doubt Your Honors have learned to have confidence in that which is said by them concerning the record and questions presented. Your Honors no doubt would find it difficult to believe that they would intentionally misrepresent. We have not charged them with such misconduct. We know that much of the fuzzing is suggested by the opinions. Both courts below ran charges together without clear definition. It is possible that our

opponents became bored with our brief and consequently failed to follow it closely. We are quite certain that we could not afford to rely upon an assertion that our opponents have fuzzed the issues without examples and detailed argument.

If this were the ordinary civil case, we could not expect Your Honors to look back into the transcript in order to test the conclusions, findings, failure to find and possible mistakes, on the part of the Trial Judge. But Your Honors have said that a denaturalization case is not to be regarded on review as an ordinary civil case. At first glance Your Honors might be inclined to believe that we could have done with summaries rather than quotes from the record, that we might have spared Your Honors question and answer quotes. Our reason for our policy is that a summary would dilute and lose some of the truth. The questions at times reveal as much as the answers. For instance, if Your Honors decide to read the entire deposition of Examiner Jordan (Vol. I, p. 262) it will be seen that the Assistant United States Attorney examined the witness as if he were hostile. She showed by her questions that she was not satisfied with the answers. This situation arose because she was endeavoring to force the witness to conform to a pattern, in order to support the theory of the prosecution. The witness destroyed this plan by sticking to the truth and not telling more than he knew. Mr. Jordan had been with the Naturalization Service since 1912 (Vol. I, p. 263). No doubt he knew very well that there was no custom or regular procedure followed, the same in one case as in every other case. He must have known that the prosecutor was trying to get him to read meaning into the check marks and other notations not warranted by the facts. If the deposition of Mr. Jordan be studied it will appear that he has testified that there was no custom or usual procedure. What was done by the

Examiner depended upon the circumstances in each case. Your Honors must know that if we attempted to convince Your Honors of such a fact by a mere statement or summary, we would court the danger that Your Honors might fall into the error of accepting the general shot gun charge already approved by two courts below and repeated here by our opponents. After the charge made by the Solicitor General, that we made general assertions, the Government Brief in Opposition proceeds as follows, (p. 8):

> "The record, however, leaves no doubt that the government met the strict burden of proof required in a denaturalization proceeding. The evidence is clear, unequivocal, and convincing. *Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654; *Klapprott* v. *United States*, 335 U.S. 601."

We felt that we could not risk leaving our opening brief alone to answer, in view of the manner in which our opponents have garbled the record. Your Honors have already indicated in the cases last cited that a case such as this is of great importance not only to the naturalized citizen involved, but to many others. Mr. Justice Rutledge said, dissenting in *Knauer*, p. 676:

> "Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.
>
> "No native-born American's birthright could be stripped from him for such a cause or by such a procedure as has been followed here."

We are unable to understand how anyone can read this record and say that the evidence is clear, unequivocal and convincing. But such a statement by high officials such as our opponents, after two courts have formally announced

the same conclusion caused us to be certain that we could not afford to reply by a general assertion that the evidence is weak and that the Government failed to meet its burden. It was up to us to demonstrate from the record that the Government has no case. This takes time. The job can not be done without detail and argument as to each point. We risk again the accusation of prolixity, but our charges can not any longer be said to be general.*

## XVII.

**The value of the constitutional privilege was destroyed. De Lucia was penalized for reliance upon his privilege. When the Court of Appeals perceived that the District Court had erred and reversed the contempt case, the Appeals Court should have perceived that the error also made mandatory the reversal of the decree in the case at bar.**

Mr. Weiner, in his book (p. 296, Section 137), advises the writer of a Brief in Opposition to be "always Belittlin". In the case at bar, the Government Attorneys have seen fit to omit many of the questions submitted by petitioner.

We respectfully refer Your Honors back to our opening brief, (p. 11) for one of these questions.

The case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to thousands of naturalized citizens. The question posed is,

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate, without

* Please compare our situation with that of counsel on both sides in **Johnson v. United States**, 256 F. 2nd 849, where the findings below were such that counsel were compelled to cover all possible errors.

evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals!

Your Honors will note that the Government Attorneys have diminished the above question to the following: We quote from the Government brief, (p. 2)

"3. Whether the District Court improperly noted petitioner's failure to testify."

If that were the question it would be a waste of time to even present it. The answer to the question as put by the Government here is that the District Court would commit no error in merely making a note that petitioner failed to testify. But that is not the question presented. Our opponents had the following to say in argument (p. 10):

"While noting petitioner's failure to testify at the pre-trial deposition in its preliminary statement of the case (R.I, 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, and all that the court said as to this was that petitioner's 'failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence.' (R.I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121. Thus, there was no unjustified reliance on petitioner's failure to testify."

Our opponents here have presented an argument new to these cases. In the courts below, the prosecutor moved for punishment and resisted the appeal in the contempt matter. In the case at bar, up to now, the Government has taken the position that the assertion of claim of privilege predicated upon the self-incrimination clause of the Fifth

Amendment was misplaced; it was a

> "false claim affecting not a title invocation and application of an adverse inference because of his failure to testify."

Now that the contempt case has been reversed, the Solicitor General makes a shift in defense. Of course it is possible that that official did not know of the position heretofore assumed by the United States Attorney. The briefs filed in the Court of Appeals in both cases have been certified here, but it does not follow necessarily that our opponents have examined them. It is doubtful if our local prosecutors, knowing Judge La Buy and being familiar with the record, would make the argument here presented by our opponents. We proceed to examine the new position assumed here by the Attorneys for the Government.

We quote from Chief Justice Taney in *Thurlow* v. *Commonwealth of Massachusetts*, 46 U.S. 504, 573, 5 How. 504, 573:

> "It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court."

Mr. Chief Justice Stone said in *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 295:

> "After trial, the district court held the statute applicable to petitioners and their employees and, as applied to them, a valid exercise of state power. 43 F. Supp. 981. The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings and conclusions of law." (citing cases)

Mr. Justice Sanford said in *Oklahoma* v. *Texas*, 272 U.S. 21, 42:

> "The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated

passages in the opinion considering the rights of the parties, but on an examination of the issues made and intended to be submitted, and which it was intended to decide."

We shall divide our reply to the above claim that Judge La Buy merely mentioned the pre-trial incident but gave it no weight, into two parts as follows:

(a) Judge La Buy did more than to merely note failure to testify in pre-trial.

(b) The rule concerning the effect of failure to testify at the trial was not applicable.

In its opinion (Vol. I, p. 336 *United States* v. *De Lucia*, 163 F. Supp. 36, 41) the District Court said:

"This memorandum shall constitute the Findings of Fact and Conclusions of Law:"

If Judge La Buy had not mentioned the refusal of De Lucia to submit to pre-trial interrogation, the Court of Appeals may have indulged in presumptions in support of the decree. The Court of Appeals might very well have presumed that Judge La Buy gave no heed to the pre-trial incident, when it came to the final consideration of the evidence. But as soon as facts are produced, presumptions fly out of the window. When the Court of Appeals found that Judge La Buy had included in the opinion of the District Court, reference to pre-trial, we respectfully submit that that Honorable Court should have considered and determined, if possible, just how much weight was given by Judge La Buy to the fact that De Lucia there invoked the Fifth Amendment. Instead of doing this, in the case at bar, the Court of Appeals remained silent concerning the Fifth Amendment. No mention is made of the privilege invoked. The Court of Appeals did say (p. 79, *United States* v. *De Lucia*, 256 F. 2nd 487, 490):

> "The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf."

The above quote is to be found in that portion of the Court of Appeals opinion describing the memorandum rendered by Judge La Buy. The Court of Appeals again referred to the fact that De Lucia did not testify at the trial (p. 83, p. 493) in the consideration of the authority to be found in *Cufari* v. *United States*, 217 F. 2nd 404, on another point. The Court of Appeals did not choose to mention the fact that De Lucia claimed the privilege. Nothing was said by the Court of Appeals concerning the pre-trial proceeding, or its possible effect on the ultimate decree. Your Honors will note that that said by the Court of Appeals and above quoted is not the same as that said by Judge La Buy.

Judge La Buy said, (Vol. I, p. 334, 163 F. Supp. 36, 41)

> "(1) The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence." (citing cases.)

The Court of Appeals did not mention this rule and chose to not indicate specific approval or disapproval. The Court of Appeals did announce a general approval of the law findings as follows: (Vol. I, 1.80, 256 F. 2nd 487, 490)

> "Its conclusions of law and the decree which it entered find ample support in the decided federal cases."

The Brief in Opposition seeks support for the decree in the rule stated by Judge La Buy. Later in this brief we shall examine the cases cited by Judge La Buy and again relied upon here by the Solicitor General.

In a separate opinion rendered in the contempt case (p. 87, *United States* v. *De Lucia*, 256 F. 2nd 493, 495) the Court of Appeals said:

> "(3) It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court."

We were in no position to complain that the Court of Appeals failed to state all of the reasons shown by the record in support of the claim of privilege. In one of our briefs filed in the Trial Court we referred to a pending indictment charging evasion of income taxes. We quoted some of the questions asked at pre-trial to show that they were designed to secure answers calculated to assist the United States attorney in the prosecution of not only that indictment but in a number of other prosecutions petitioner has reason to fear. One reason we have for calling our trial brief to the attention of Your Honors appears in the following which we quote (Vol. I, p. 56):

> "The *Costello* case
>
> "We quote from the Memorandum prepared by Your Honor.
>
> > 'The Court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the de-

fendant should be required to answer same. See *United States* v. *Costello*, 16 F.R.D. 428 Aff'd 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig*, 16 F.R.D. 437.'

"Upon reconsideration we trust that Your Honor will decide that the *Costello* case is not in point here. In the case at bar, De Lucia was asked 109 questions. Costello was not in such a bad situation as that confronting De Lucia, or if he was his lawyers failed to acquaint the Trial Judge with the danger involved in any answers to the questions put to Costello. In the case at bar, we had pointed out to Your Honor reasons for concluding that De Lucia is in real danger and we incorporate additional reasons here in this brief.

Judge Swan said about *Costello*, p. 662:

> "'* * * but he still was under the necessity of showing some reasonable basis for his fear of self incrimination by answering the questions propounded. Judge Clancy rightly held there was no such basis'."

308 Your Honor will note that Judge Swan held that any conspiracy to obtain citizenship had terminated and that, p. 662:

> "'* * * the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred, was too remote to support a *bona fide* need for the assertion of the privilege'."

"We expect to point out here some of our reasons for requesting Your Honor to hold that the danger to De Lucia was clear and present, not remote. Upon reconsideration we trust that Your Honor will see that the *Lustig* and *Jerome* cases are not in point. There the defendants were premature with their claim of self incrimination.

"The background and history can better be understood after Your Honor considers the affidavit of Attorney Joseph Bulger submitted herewith. Your Honor

is authorized to take judicial notice of much of the background material, records, Congressional hearing reports, etc., as they were introduced before Judge Igoe in the parole warrant cases."

The affidavit of Attorney Joseph Bulger is appended to the contempt case brief filed in the Court of Appeals and certified here.

We repeat from our opening brief (p. 21) Judge La Buy failed to distinguish between the *Costello* case and the case at bar. One might read the opinion rendered by the Court of Appeals in the contempt case, (herein p. 85) without realization of the great difference between the *Costello* case and the case at bar. We respectfully submit that the power of supervision vested in this Honorable Court should prompt Your Honors to clarify the law upon the subject. Without such clarification, the opinions below will, no doubt, be used in furnishing prosecutors apparent authority to take advantage of naturalized citizens.

We respectfully submit that the contempt order helps to point up the manner in which the United States Attorney disregarded the rights given all naturalized citizens by Congress. The record shows that the Government officials started to build its case on what could be forced from petitioner. First with an administrative subpoena. Then the United States Attorney with a motion to strike the answer filed in the case at bar sought to compel petitioner to admit portions of the complaint in an answer. Then the Government filed Requests for Admissions Under Oath (Vol. I, p. 35) and took the position that the failure of petitioner to answer was binding as admissions. Then the United States Attorney sought oral answers in a deposition and obtained a rule to show cause. It is reasonable to conclude that if when he filed his complaint the

prosecutor was in a position to prove his case, without compelling petitioner to become a witness against himself, the prosecutor would not have resorted to all of this pre-trial procedure. If the maker of the good cause affidavit (Vol. I, p. 8) had been truthful he would have said that he was suspicious of petitioner and hoped to be able to later build a case against him. Good cause to institute a suit case can not exist in the absence of evidence to prove the charge.

As we write this the mail man brings *Isaacs* v. *United States*, 256 F. 2nd 654, to illustrate the manner in which prosecutors seek to tread upon the Constitutional rights of citizens by claiming that the right does not exist when in fact the prosecutor is at the same time making use of his power of inquisition. In *Isaacs*, the prosecutor brought a business man before the Grand Jury. When the witness refused to give evidence against himself and claimed his constitutional privilege, the prosecutor moved before the District Court to have him either answer or be punished. Your Honors will note from the questions and answers set out in the opinion that the prosecutor advised the witness that he had no constitutional rights. It is alarming to find such an abuse of power but that is not all. Instead of keeping the prosecutor within bounds the District Judge found the witness guilty of contempt. The Court of Appeals reversed. We respectfully submit that the witness should not have been obliged to go through the ordeal at all. The statement and re-statement of the principles involved by this Honorable Court is not enough to keep some prosecutors within bounds. We trust that Your Honors will see fit to grant certiorari in the case at bar. We respectfully submit that in order to safeguard the constitutional rights of citizens, it is not only necessary for this Honorable Court to remind prosecutors and some judges, of these rights, but Your Honors should, in the interest of the administra-

tion of justice, apply the principles to situations created by new methods of abuse. In the words of Chief Justice Warren, Your Honors should:

> "apply to ever changing conditions the never changing principles of freedom."

The fact that a District Judge, as experienced as Judge La Buy would fail to recognize rights guaranteed by the Constitution indicates that perhaps some of our judges have been misguided due to the broadening of the right to discovery pre-trial in general. To be specific, the fact that Your Honors denied certiorari in the *Costello* case has been taken as a green light, authorizing the establishment of a denaturalization case by means of interrogation of the defendants. We know that such result was not intended, but this record makes it clear that that is what happened. The denial of certiorari here will no doubt leave the opinion of Judge La Buy and of the Court of Appeals as authority for the prosecutor to first file his complaint and to then seek his proof from the mouth of the defendant. A defendant refusing will not only be punished with a contempt sentence, including jail, but the fact of refusal will be regarded as enough to convert a weak case into one of clear convincing proof. In *Dashback* v. *United States*, 254 F. 2nd 687 the sentence was three years.

In the consideration of this Petition for Certiorari, we respectfully submit that Your Honors are called upon, without any help from the Court of Appeals, to guess how much weight was given by Judge La Buy to the fact that De Lucia invoked the Fifth Amendment. We respectfully submit that the validity of the reasons urged in defense of the action of the courts below is a matter which this Honorable Court should consider. But first Your Honors are required to determine from the record just what action has been taken by Judge La Buy, with the approval of the

Court of Appeals. In hazarding a guess as to how far the District Court was influenced in its ultimate decree, please keep in mind that Judge La Buy was of the opinion that De Lucia had no right to the privilege. Of course if Judge La Buy had been correct in this and De Lucia claimed the privilege without right, the refusal to answer the pre-trial questions might have been, under some circumstances, fatal to the defense. At least Judge La Buy was consistent. Judge La Buy ruled in effect that De Lucia should either answer or take the consequences. One consequence was a fine. But why should Judge La Buy stop there? We respectfully submit that the Court of Appeals was not consistent. Considering the two opinions of the Court of Appeals together, in effect it has been said that Judge La Buy was mistaken in not recognizing that De Lucia had a right to refuse to answer without reprisal, yet at the same time, the Court of Appeals has approved the action of the District Court, when Judge La Buy threw this refusal into the scale. The inconsistent conclusions we here suggest are valid only if Judge La Buy did not in fact permit himself to be influenced in the final decision because of the pre-trial proceedings. That brings us back to the question now under discussion.

In order for Your Honors to guess at what may have influenced Judge La Buy it will be necessary of course to examine the record. Your Honors will note that prior to trial, Judge La Buy filed a memorandum (Vol. I, p. 47), concerning three government motions . . .

(1) To strike answer (Answer at p. 15)

(2) To compel answers to oral interrogatories (Interrogatories at p. 23)

(3) To compel answers to certain requests for admissions. (Requests at p. 35).

As to (1), Judge La Buy recognized the right of De Lucia under the Fifth Amendment to file a general denial. Consequently, the District Court overruled (1), (p. 48). The answer was accompanied by the following (Vol. I, p. 15):

**Note of Explanation.**

"There are some matters correctly stated in the complaint, but the defendant respectfully requests that he not be required to point them out and admit them for fear that it may be said later that he has waived his right to the protection of the Fifth Amendment. This defendant, if the occasion arises, intends to claim the privilege. In a general way it may be said that the defense is based upon the claimed validity of the judgment of the Naturalization Court. This answer is intended in good faith to put the case at issue and to require strict proof, particularly of matters alleged seeking to show the invalidity of said judgment."

As to (3) Judge La Buy said (Vol. I, p. 48):

"No provision can be found either in Rule 36 or in the other procedural rules which would authorize this court to compel a defendant to answer a request for admissions. *United States v. Schine Chain Theatres*, 4 F.R.D. 109, 111; *Momand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568, 573."

As to (2), Judge La Buy said (p. 48):

"The second motion is to compel the defendant to answer oral interrogatories posed at his deposition and which he refused to answer on the ground that he did not want to be a witness against himself and declared the privilege of the Fifth Amendment. The court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States v. Costello*, 16 F.R.D. 428 Aff'd 222 F. (2d) 656, cert. den., 350 U.S. 847;

*United States* v. *Lustig*, 16 F.R.D. 138; *United States* v. *Jerome*, 16 F.R.D. 138. * * * It is further ordered that the defendant answer the oral interrogatories posed at his deposition within three days from date hereof."

A couple of days later Judge La Buy filed a supplemental memorandum, further explaining reasons for overruling the Government as to (1) and (3) from which we quote (p. 50, 51):

> "It is apparent that the government considers this case to be an ordinary civil suit. However, the court must recognize the admonition of the Supreme Court of the United States, often repeated, that denaturalization suits are not ordinary civil law suits. In *Klapprott* v. *United States*, (1949) 335 U. S. 601, 611-612, the Court declared. * * * (quotation omitted).
>
> These emphatic declarations of the Supreme Court of the United States, impel this court to the conclusion that any default, including technical and procedural defaults which in ordinary civil cases result in evidentiary admissions, cannot be utilized to mitigate, lessen or relieve the government of the positive and affirmative burden imposed by the Supreme Court to prove its case 'beyond a reasonable doubt.'"

In this Honorable Court we respectfully submit that a fair and reasonable consideration of the record, including the above, leads to the conclusion that if Judge La Buy had been of the opinion that De Lucia had lawfully invoked the Fifth Amendment, Judge La Buy would have overruled all three of the Government motions. Judge La Buy having made this mistake as to the law in ruling on (2), it follows that the Trial Judge should have regarded, as Judge La Buy did, the refusal to answer as contempt. The record shows that Judge La Buy had been furnished briefs before and after the position taken by Judge La Buy as to these three Government motions. (pp. 16, 41, 46, 52).

It is fair to assume that Judge La Buy was of the sincere belief that under the facts and the law, De Lucia had no right to the privilege. It is idle now for the Solicitor General to argue that Judge La Buy merely noted the refusal in passing; that the Trial Court gave the incident no heed. As we have said, our local United States Attorney, knowing Judge La Buy and being more familiar with the record did not suggest that it was possible that Judge La Buy over looked the fact that petitioner had refused to comply with his order. The cases, contempt and denaturalization, were considered together in the Trial Court. We separated them for the purpose of appeal for fear of some objection to our record otherwise. Your Honors will note that said by Judge La Buy, which we quote from the opinion (Vol. I, p. 325, *United States* v. *De Lucia*, 163 F. Supp. 36, 37):

> "The defendant, although present in the courtroom throughout the trial, offered no evidence on his own behalf. He previously invoked the protection of the Fifth Amendment, and has refused to obey the court's order requiring him to respond to questions asked at his deposition. The sole information which this defendant has given is that he is Paul De Lucia and resides at 1515 Bonnie Brae, River Forest, Illinois."

Your Honors will observe that when the Solicitor General (p. 11) quoted from Judge La Buy the last sentence was omitted, *i.e.*,

> "The sole information which this defendant has given is that he is Paul De Lucia and resides at 1515 Bonnie Brae, River Forest, Illinois."

As is shown by the record (Vol. I, p. 23) that information as to petitioner's name and address was given in answer to the oral interrogatories before petitioner claimed the privilege. That is the only place in the record where this information was given.

It is of course possible that our opponents overlooked the significance of the omitted sentence. Now we ask Your Honors, is it not fair and reasonable to say that Judge La Buy has indicated that he took all of the above into consideration, including the omitted sentence? Why speak of the failure of De Lucia to give information unless the Judge believed that De Lucia was obliged to answer the pre-trial questions? Why speak of the refusal unless it be inferred that the refusal was wrongful and that this refusal helped to support the decision made? After all, the opinion was prepared for the purpose of demonstrating the ground for decision. Your Honors have noted that Judge La Buy took pains to have his reasons show in the record. Your Honors will note from the above quotation that Judge La Buy considered three things together, *i.e.*, failure to offer evidence, refusal to obey the order of court as to pretrial and refusal to supply information.

It is reasonable to assume that the Trial Judge from the beginning was certain that the loser before him would appeal. The care taken by Judge La Buy to have the record show support and reasons were demonstrated when Judge La Buy, after deciding the three motions and after rendering an opinion designed to show reasons, saw fit to supplement (p. 49) his original opinion on his own motion. Judge La Buy was careful to distinguish between (1) and (3) on one hand and (2) on the other, concerning the three motions made by the Government. If in fact Judge La Buy, in his final opinion, merely noted the refusal to obey and the failure to inform, as a preliminary statement of the history of the proceedings, Judge La Buy, being careful, would have included (1) and (3). (1) and (3) are part of the history as well as (2). In fact, all three belong in a related group. It is now fair for Your Hon-

ors to conclude that Judge La Buy considered that the Court had ruled on (1) and (3). They were no longer in the case. (1) and (3) had nothing to do with the final decision or decree. So it followed that (1) and (3) were omitted from the final opinion. (2) was included because Judge La Buy was still of the opinion that the refusal to obey and the failure to inform had a bearing on the ultimate outcome. If there be one matter in the case on which the District Court stood firm, it was that DeLucia was obliged to answer the interrogatories or suffer the consequences. The record shows that after Judge La Buy filed his opinion (p. 47) and supplemental opinion (p. 49), we submitted a brief (Vol. I, p. 52) in which we endeavored to show the error as to (2). Judge La Buy was requested to reconsider. At the opening of the trial, a motion for a rule to show cause was entered and decision on the rule was deferred until after the trial (Appendix Contempt Proceedings, p. 19). The record and printed appendix in the contempt case has been filed here for reference. The contempt order (p. 40) was entered four days after the final opinion in the case at bar was rendered. When the prosecutor asked the Judge to punish petitioner during the trial probably in the hope that an immediate jail sentence would cause him to change his mind and answer, it is reasonable to assume that Judge La Buy delayed action, waiting to see if petitioner would take the stand at the hearing. If petitioner had done so, the contempt sentence may not have been imposed. When finally Judge La Buy saw that petitioner persisted in refusing to testify or furnish information, the Judge punished petitioner, not only with a fine, but by invoking the rule said by Judge La Buy to give rise to an inference that petitioner was not in a position to combat or explain away the government's evidence.

Your Honors will note from one of the briefs filed (Vol. I, p. 57), that when petitioner was questioned by the prosecutor the danger was real, imminent and pressing. We quote from the dissenting opinion in *Brown* v. *Walker*, 161 U.S. 591, 628:

> "A final observation, which ought not to be necessary, but which seems to be called for by the tenor of some of the arguments that have been pressed on the court, is that the constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.
>
> "But surely no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit."

We know that Your Honors will apply the law as to the Fifth Amendment regardless of any opinion Your Honors may derive from the record concerning the guilt or innocence of petitioner, but in view of the fact that our opponents assume guilt in the discussion of inferences permit us to suggest the possibility that De Lucia obtained citizenship in a proper and legal manner. Further that if petitioner were not under the fire of other prosecutions and was required to meet this charge alone, he might have been free to supply information. But then again, any such desire would no doubt, present difficulties. We quote from that said Mr. Justice McKenna, dissenting in *Wilson* v. *United States*, 221 U.S. 361, 392:

> "And it is asked, supposing a witness upon the stand in a prosecution for robbery, 'a question is put, the effect, of which were he to answer it might be to

subject him to conviction in respect to another robbery, attended with murder (such high offenses give emphasis to the argument) on the ground of public utility and common sense is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone?' Bentham on Judicial Evidence, vol. 5, page 229 *et seq.* A reply would be difficult if government had no other concern that the punishment of crime." * * *

"(394). The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power and that passion will not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened and destroyed they may be when interest and desire feel their restraint. What then of the end: will history repeat itself? And this is not a cry of alarm. '*Obsta principiis*' was the warning of Mr. Justice Bradley in *Boyd* v. *United States* against the attempt of the Government to break down the constitutional privilege of the citizen by attempting to exact from him evidence of fraud against the customs laws. I repeat the warning. The present case is another attempt of the same kind and should be treated in the same way."

Of course Your Honors know the importance of adhering to constitutional safe-guards. *Slochower* v. *Board of Education*, 350 U. S. 551, 557. Your Honors know very well that there exists a constant pressure to weaken these barriers. Your Honors know that there is a powerful element in our society, of the belief that one who claims the privilege must be guilty and should be punished. Such expression as "Fifth Amendment Communist" catch on because

of the existence of this element. Your Honors know too that some of those entrusted with the enforcement of our law make use of this sentiment.*

In *Bilokumsky* v. *Tod*, 263 U.S. 149, (Our Opening Brief, p. 82), the hearing officer drew an unfavorable inference from the fact that Bilokumsky, when questioned, under advice of counsel, stood mute. Your Honors approved. Bilokumsky was an alien. Please compare with *Bean* v. *Barber*, 163 F. Supp. 111. Bean filed an action in the District Court seeking to enjoin the District Director from excluding him from the United States. We quote, p. 112:

> "Defendant, relying on Section 212 (a) (20) of the Immigration and Nationality Act (8 U.S.C.A. § 1182 (a) (20), answers the complaint by asserting that the special inquiry officer and the Board of Immigration Appeals properly denied plaintiff entry as a citizen of the United States in view of his refusal to answer relevant questions put to him by the officer of the Immigration Service."

Judge Harris granted summary judgment and said, p. 113:

> "However reprehensible the conduct of plaintiff in absenting himself from the United States in order to avoid service in the Armed Forces, he cannot be required to forfeit his established citizenship as the result of procedural legerdemain. Section 8 U.S.C.A. § 1182 has no application under the facts herein. Therefore, plaintiff is entitled to remain in this country absent legal and appropriate steps to deport him."

Although we are unable to ascertain from the opinion in *Bean* whether or not the *Bilokumsky* case was mentioned, it would be reasonable to assume that the hearing officer and the Board relied upon some such case as *Bilokumsky*. If so, those officials failed to distinguish between the status

* In **Sternberg v. United States**, 163 F. Supp. 590, an act of Congress designed to punish one receiving an annuity who invokes the Fifth Amendment was held unconstitutional.

of a citizen and an alien. That, we submit, is what happened in the case at bar, Judge La Buy failed to keep that important distinction in mind. Judge Harris was able to see that the case for the Service was lacking in a vital element. Judge Harris was able to understand further that that element could not be supplied

> "—in view of his refusal to answer relevant questions —"

So Your Honors must be constantly on guard to prevent, if possible, the use of silence in the place of evidence in cases where it is improper to apply any such rule resulting in "procedural legerdemain."

## XVIII.

**The question concerning the abuse of the Federal Rules of Procedure is properly before this Honorable Court.**

We quote from the Brief in Opposition (p. 7):

> "At the outset, we point out that the Court of Appeals has reversed petitioner's conviction for contempt in refusing to answer questions asked during a pre-trial deposition (Pet. 85-86) and the government has not petitioned for certiorari in that case. Petitioner's argument with respect to the abuse of the Federal Rules of Civil Procedure is, therefore, not properly before this Court."

It is true that the Court of Appeals reversed in the contempt case but, as we have pointed out, the fine assessed was not the only punishment. If the fine in fact was the only punishment it may have been easier to pay it than foot the bill for the costs of appeal. A principle was involved. We respectfully submit that the question concerning the abuse of the Federal Rules of Civil Procedure is properly before this Honorable Court for the reason that such abuse resulted in furnishing a prop to the decree, because of the mistaken opinion that petitioner had no right to the privilege. Of course the privilege has no value if its claim results in an assumption that because of petitioner's refusal

to answer or give information that "he was not in a position to combat or explain away the Government's evidence." (Vol. I, p. 334, 463 F. Supp. 36, 41) The sanction was applied in the case at bar. If there were any logic to the position taken by the Government Attorneys here, the Government could have confessed error in the contempt case and left petitioner without a remedy. More procedural legerdemain.

## XIX.

**The Court of Appeals erred in approving the application of a sanction by the District Court because of failure to testify.**

We again quote from the Government brief (p. 11):

> "* * * failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence' (R. I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121.' Thus, there was no unjustified reliance on petitioner's failure to testify.

> "'This Court there said, of a criminal case, 348 U.S. at p. 138-139: 'Once the government has established its case, the defendant remains quiet at his peril'."

Your Honors of course will note that the quote from the *Holland* case demonstrates that the rule applies only after the Government has established its case. In the case at bar, Judge La Buy applied the rule in order to bolster up the Government case, where the evidence had failed.

We next examine the cases cited by Judge La Buy under the following, (Vol. I, p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

Your Honors will observe that the Court of Appeals did not choose to cite the following cases cited by Judge La Buy. So we decided to not mention these cases in our opening brief. Our opponents here rely upon the rule announced by Judge La Buy, but instead of citing these cases, as authority for the rule, they cite but one case, *i.e.*, *Holland* v. *United States*, 348 U.S. 138-139. The *Holland* case is authority for our position as well as are the cases cited by Judge La Buy. In the *Holland* case Your Honors took pains to establish that the lower courts were justified in holding that the defendant had been proved guilty beyond a reasonable doubt. It was only after such proof was seen to have been produced that Your Honors said that the defendant had remained quiet at his peril. In the case at bar, we contend that the Government failed to establish even a *prima facie* case, so it follows that Judge La Buy erred in applying the rule.

We submit that it may be important to determine if Judge La Buy was misguided concerning the law by these cases. Perhaps the reason these cases were not repeated by the Court of Appeals is that that Honorable Court perceived that the rule was not applicable. Still, we submit, it is important to determine what may have influenced Judge La Buy. It is possible that if Judge La Buy had taken a different view of the law, the decision may have been different.

**Mammoth Oil Co. v. United States, 275 U.S. 13.**

We quote (p. 51):

> "The guiding considerations by which the proper significance of such silence is to be ascertained were well stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster*, 5 Cush. 295, 316: 'Where, for instance, probable proof is

brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution." While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (*Northern Railway Company* v. *Page*, 274 U.S. 65, 74), it justly may be inferred that he was not in position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. *Runkle* v. *Burnham*, 153 U.S. 216, 225; *Kirby* v. *Tallmadge*, 160 U.S. 379, 383; *Bilokumsky* v. *Tod*, 263 U.S. 149, 154; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111; *Clifton* v. *United States*, 4 How. 242, 247; *Missouri K. & T. Ry. Co.* v. *Elliott*, 102 Fed. 96, 102. As to facts appearing to have been within the knowledge or power of Sinclair, we find that the evidence establishes all that it fairly and reasonably tends to prove."

We have quoted at length in order to remind Your Honors that the rule does not apply at all *without a pretty stringent proof of circumstances to prove the charge* and where applied the absence of denial alone is not entitled to much weight. Your Honors will consider that in his answer (Vol. I, p. 52) De Lucia denied everything. His failure to testify

is explained in his fear of other prosecutions. We have adopted a portion of the argument made by the lawyers in the above cited case as follows, p. 15:

The legal effect of the evidence is always a question of law. The rule in the federal courts has long been well settled that fraud is not to be presumed; that it is not to be presumed from any number of lawful acts; that where an act and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud cannot be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing.

No inference is reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption. The law requires an open, visible connection between the principal fundamental facts and the deductions to be made on remote inferences. A presumption is not a circumstance in proof, and it cannot therefore be made the legitimate foundation for another presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact which is sought to be established by the dependent presumption. (citing cases)

No unfavorable presumption arises from the failure to produce evidence unless there is some duty to produce it, nor unless it is shown to be within the control of the party who fails to produce it, nor from the failure to call as a witness one whom the other party had the same opportunity of calling, nor if the testimony not given is privileged. (citing cases.)

No inference may be drawn from the refusal of the witness to testify on the claim of constitutional privilege

against self incrimination. *Beach* v. *United States*, 46 Fed. 754; *State* v. *Harper*, 33 Ore. 524; *Powers* v. *State*, 75 Neb. 226; *State* v. *Weaver*, 165 Mo. 1.

A defendant is not called upon to introduce evidence to contradict or explain facts which are insufficient to establish any liability against him. The true rule, is that silence of a party, may be considered in weighing proofs already adduced tending to fix a liability on him in matters where complete and more exclusive knowledge of the facts concerning which he is silent, is laid at his door. (citing cases.)

Some authorities are to be found cited in 70 C. J. Witnesses, p. 754 § 910 to support the following:

> "No inference prejudicial to either party can legitimately be drawn from the witness' assertion of his privilege of refusing to answer on the ground that the answer may tend to incriminate the witness."

**Local 167 of I.B. of Teamsters v. United States, 291 U.S. 293**

This was an injunction suit. A previous criminal judgment had conclusively established the conspiracy and the parties. Mr. Justice Butler said:

> "The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants participation continued until the filing of the complaint."

Your Honors know that where one claims he has withdrawn from a conspiracy a special rule applies. Our claim in the case at bar is that the Government failed to introduce substantial evidence and that Judge LaBuy failed to consider the asserted reasons given by the defendant for failure to testify.

**United States, ex rel Bilokumsky v. Tod, 263 U.S. 149.**

Here the defendant was afforded an administrative hearing. After an order of deportation he obtained a writ of habeas corpus in the District Court. His writ was dismissed and he appealed. This Honorable Court said, p. 157:

> "Moreover a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received." (citing cases.)
>
> "To prove alienage the inspector called Bilokumsky as a witness. He was sworn, but when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name."
>
> "Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak."

**United States, ex rel Vajtauer v. Commissioner of Immigration, 273 U.S. 103.**

Here an alien defendant in an administrative proceedings was ordered deported. After a hearing the District Judge dismissed his writ of habeas corpus and he appealed. In the administrative hearing the defendant indicated that he would explain after all of the evidence was in. His silence was commented on by Mr. Justice Stone after citing *People* v. *Pfanschmidt*, 262 Ill. 411, 449 p. 112.

**Runkle v. Burnham, 153 U.S. 216.**

This was a suit on a contract. Runkle and his attorney had testified. Mr. Justice White said, p. 225:

"If the new power of attorney was sent, and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents. Their silence must necessarily make against them on the question of revocation." *Mansfield J., in Holdane v. Harney*, 4 Burr 2484, 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of *Clifton v. United States*, 4 How 242."

The last sentence of the opinion is as follows, p. 228:

"The failure to produce it, or to testify in reference to it, when its contents were peculiarly within the knowledge of Runkle, justifies the presumption that its provisions would have been unfavorable to Runkle's position."

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**Kirby v. Tallmadge, 160 U.S. 379.**

This was a bill in equity, a dispute over title to land. A party to the action had exclusive possession of a knowledge of facts and failed to offer them in evidence.

**Northern Ry. Co. v. Page, 274 U.S. 65.**

This is a personal injury suit against a railroad operating in Costa Rica. Plaintiff was shot by soldiers while a passenger. One of the questions involved was whether the conductor informed the officer in charge of the troops that the train carried no revolutionists. The conductor testified but the record fails to show all of his testimony. The trial judge directed a verdict and the Circuit Court reversed. This certiorari followed. Mr. Justice Butler noted, p. 73 that:

"In the opinion of the majority of the Circuit Court of Appeals it is said (p. 752): 'The jury might have found that, inasmuch as Ramsay, the conductor, did not

testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train; nothing of the kind was said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train, or received it too late and under such circumstances as to render it unavailable.'

"This view cannot be sustained. There was no basis for the court's assumption. There was nothing reasonable to warrant the rejection of Grant's testimony. Indeed, plaintiff's own testimony tended to corroborate Grant. And the district judge in charging the jury assumed as an undisputed fact that when the train stopped the officers were informed by Ramsay and Veitch that there were no revolutionists on the train. The case having been so put to the jury, it is to be assumed that they considered the matter on that basis. Defendant was not required to satisfy the jury that it was not guilty of the negligence alleged against it. If Ramsay had not testified at all, his failure so to do could not be taken as substantive evidence of any fact. If, instead of showing that Ramsay had told the officers that no insurrectos were on the train, plaintiff had put in testimony that no such information had been given to the government forces and then Ramsay had remained silent, it would have been permissible to draw an inference that he was not in position to assert the contrary. But that is not the situation here presented." (Citing cases.)

So Your Honors will perceive that this Railroad case instead of supporting the position taken by Judge La Buy does just the opposite. Your Honors have noticed that Judge Butler said:

"If Ramsay had not testified at all, his failure so to do could not be taken as substantive evidence of any fact."

In the case at bar, De Lucia did not testify and Judge La Buy took that as substantive evidence of facts missing from the case for the Government.

**United States v. Roberson, 233 F. 2d 517.**

We could not find a better case in support of our argument than this *Roberson* case. It demonstrates clearly the error committed by Judge La Buy. The Government seized an automobile claiming that it was being used in violation of gambling laws. The District Judge found for the defendant. The Government appealed. Judge Cameron said in affirming the trial judge, p. 519:

"(1) It is suggested that the failure of the claimant, Roberson, to testify and thereby explain the purpose for which the automobile was being used when it was seized was a fact which should have been taken against him. Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position. *Local 167 International Brotherhood of Teamsters* v. *United States*, 291 U.S. 293; *Anderson* v. *United States*, 185 F. 2d 343; *Williams* v. *United States*, 199 F. 2d 921, and *Kent* v. *United States*, 157 F. 2d 1.

"It is equally well settled, however, that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a *prima facie* case. It will not excuse a failure of the Government to meet the burden of establishing facts sufficient to make out a case for forfeiture. Until the Government had sustained the burden of producing evidence establishing its right to forfeiture, the claimant had no call to bring forward any evidence at all, but was entitled to submit the

case to the fact-finder, trusting solely to the weakness of the Government's evidence.

"(2) Corpus Juris Secundum classifies this principle of law as a Pseudo-Presumption and discusses its effect in some detail, stating: 'Necessity for *prima facie* case. Where the party on whom the burden of proofs rests had failed to make out a *prima facie* case, the absence of the adverse party, or his failure to testify, raises no unfavorable inference against him.' This Court recognized in a libel case the inference allowable against a party who fails to testify and supply information within his knowledge but called attention to the limitations on this rule: 'This is not to say that (defendant's) silence could supply a complete failure of proof. It is to say, though, that with the proof as it was, having at the least a strong tendency to prove the case for forfeiture, claimant's failure to offer an explanation of the incriminating circumstances could be taken against him.'

"(3, 4) It is not necessary to discuss the effect of the permissible presumption in a proper case because it is clear here that the Government's proof did not establish even a *prima facie* case for forfeiture. It was necessary for the Government's evidence, of itself, to be sufficient to support the judgment sought. The Government's evidence, and all inferences which may be drawn therefrom, were entirely inadequate to support its demand for condemnation and forfeiture. We cannot say that, in the face of this weak showing, it was not natural and prudent for the claimant to introduce no evidence at all. He was in position to rest secure upon the failure of the Government to make proof which would justify forfeiture. Under these circumstances, the failure of the claimant to testify cannot work against him so as to supply a case where, before, none existed."

**Daniel v. United States, 234 F. 2d 102.**

This was a suit brought by the Government for money, alleging fraud in the matter of purchase by the defendant,

a non veteran, of trucks ear marked for priority to veterans. The trial court found for the Government and the Circuit Court affirmed with a divided court. Judge Rives in applying the rule concerning failure to testify took pains to point out that this was a civil case. The burden was not as great as that in a criminal case. We refer Your Honors to the dissent by Judge Cameron from which we quote, p. 112:

> "Finally, the majority would affirm the lower court because the defendant did not take the stand to testify. Certainly the Court below did not mention in its findings that it indulged any presumption arising therefrom; and this Court ought not to prop up those findings by, itself, raising the presumption. But even if it were proper so to raise it, the presumption has no validity here."

So in the *Daniel* case we have a case in which the trial court did not mention the rule and the Circuit Court made use of it in order to affirm. Your Honors will note that Judge Cameron objected to the use of the rule, which he termed a crutch, because the complaint charged fraud which requires clear proof.

**United States v. Nowak, 133 F. Supp. 191, 196.**

This is a communist case. Your Honors will note that the rule was merely mentioned in passing as Judge Picard distinguished the *Schneiderman* and *Baumgartner* cases. We quote p. 196:

> "It has been held even in criminal cases that ' * * * where the party having the burden makes a probable case on an issue as to which the accused has peculiar knowledge of the facts and may easily prove them and the prosecution cannot, an inference arises that the truth is with the prosecution.' *Williams* v. *United States;* 5 Cir., 170 F. 2d 319, 322.

> "Certainly defendant would know better than any other person what his state of mind was at a given time. Yet defendant did not see fit to testify nor did he offer to explain his failure to do so."

Your Honors will note the qualification put upon the rule and overlooked by Judge La Buy. The *Nowak* case was affirmed, 238 F. 2d 282, with no mention of the rule. The Circuit Court said that the findings of fact were supported by substantial evidence.

In *Nowak* v. *United States*, 355 U.S. 802, reversing the decree, Mr. Justice Harlan noted the absence of a vital link in the Government's proof. If Your Honors had seen fit to supply that link because of the failure of Nowak to testify, Your Honors would have followed the reasoning of the courts below in that case. It is our respectful contention that Judge La Buy regarded the failure to testify as sufficient to bolster up a weak case and to supply absent vital links in the chain of proof.

## XX.

### Summary of Argument.

Contrary to the claim made in the Brief for the Opposition, petitioner is not shown to have made a false assertion that he had never been arrested. ..... 2

Our reason for not making a more detailed argument concerning this matter of arrest in our opening brief was that the District Court shifted away from the charge. Further the complaint limited the matter of falsity about arrest to the manner in which the Certificate of Arrival had been obtained. The Certificate of Arrival was issued before any papers were filed as a routine matter. There was no proof of any representations made in order to procure it. ..... 3

The evidence leaves a void as to what petitioner may have said or represented at the time of entry. .... 3

We quote the rule to be applied where the desired inference is precluded by testimony to show that the fact does not exist. ..... 4

The Trial Judge must have perceived the failure of proof above as no finding was made along the line of the charge in the complaint concerning an arrest. The evidence leaves a void as to what may have been said concerning arrest to the Preliminary Examiner. That official did not remember petitioner or the incident. The Designated Examiner was not produced. The Government left that which may have transpired before him as a blank. ..... 4

We set out the question and answer concerning arrest and show that the answer "No" may have been truthful depending upon how the question was understood. The examiner did not remember the petitioner or the incident. ..... 5

We reply to the argument that another man was in fact Paul Maglio. This assumes that there could be only one Paul Maglio. We cite a case on the use of the name of another. ..... 5

We reply to the argument which assumes that there could be only one Felice De Lucia. We point out that our opponents here make assumptions not based on the record. ..... 5

Judge LaBuy did not find that petitioner was the same person who had a criminal record. The evidence left a gap on this matter of identity. ..... 6

The foreign documents concerning the conviction of a Felice De Lucia were never connected with petitioner, so in the absence of a finding by the Trial Judge it should have been presumed on appeal that Judge La Buy gave the foreign documents no heed. Therefore there was no evidence to show the arrest and conviction of petitioner. ..... 8

We quote from the opinion of the Court of Appeals to show that that Court added to the findings. The addition had no support in the evidence. ..... 9

We cite some cases on the effect of refusal on the part of the trial judge to find facts. ..... 9

We copy some rules to apply in the review of findings where the evidence is undisputed. ..... 9

Our opponents have overlooked the cases cited by us to show that Your Honors in a case such as this will re-examine the record. ..... 10

We request Your Honors, in re-examination to bear in mind the significance of the absence of findings. ..... 10

Every time the Trial Judge found a gap in the chain of evidence the case was treated as if petitioner were an alien or an applicant for naturalization. ..... 11

Our opponents argue that petitioner employed a scheme by which he requested change of name so that any inconsistencies in identity might be obscured. .... 11

We reply that from the circumstances it is more reasonable to believe that petitioner acted legally and in good faith. .... 11

We quote the rule to be applied where the evidence admits of two inferences. .... 14

We reply to the argument that the use of another name thwarted investigation. Petitioner was compelled to use the name under which he entered. His request for change invited inquiry. .... 15

We quote from the testimony of Examiner Jordan to show that the matter of name was no doubt discussed during preliminary examination. .... 16

We argue that a presumption arises against the Government. Mr. Rando, acting at the request of the Passport Division, made an investigation in Italy. Although he produced many records, he omitted and did not account for the record concerning the passport and visa of petitioner. .... 17

We point to circumstances to show that the prosecutor first filed his complaint without evidence depending on pre-trial proceedings. Then after he saw that petitioner did not intend to cooperate, he commenced his hunt for other evidence. .... 17

Mr. Rando must have had enough information from the Preliminary Form to put him on the trail of petitioner through France. The failure of the Government to show what Mr. Rando learned should create a presumption against its case. .... 18

The failure on the part of the prosecutor to ask Mr. Rando what he had learned from the records of the American Counsel should create a presumption that such evidence if produced would have contradicted the theory of the Government. ..... 18

We compare this case with a suit in equity to set aside a judgment and set out some of the rules applicable when evidence is claimed as newly discovered. 19

We cite a case where it has been held that plaintiffs cannot select what they will reveal and then expect equitable relief. ..... 21

We point out gaps in the proof relative to that which may have occurred if the petitioner ever did appear before Designated Examiner McKay. ..... 22

The death of Mr. McKay did not relieve the Government from the production of other evidence to show what may have taken place before Examiner McKay. The prosecutor preferred to rely upon speculation and inferences from so-called custom. ..... 22

We point to the testimony of Mr. Fish who signed as a witness to show that it is probable that the so-called usual procedure was not followed in this case. 22

We show how a finding concerning the lack of knowledge on the part of Mr. Fish is based upon evidence which gives rise to another inference, *i.e.*, the custom was not followed— ..... 24

We point to a number of bits of evidence available to the Government and not produced which may have shown that which took place in the Naturalization Court. ..... 25

We quote from the opinion of the District Court concerning use of a name and point to lack of proof in support. ..... 26

We copy a few paragraphs from the complaint to show failure of proof and argue that the pleader must have known there could be no supporting proof. 27

We advance a theory based upon the failure on the part of the prosecutor to prepare the case for the Government. First he relied upon pre-trial proceeding and after petitioner refused, he concluded that the Government could rely upon an inconclusive case. ..... 27

We furnish reasons for our claim that the prosecutor filed a complaint containing allegations known by him to have been false. ..... 28

There is no evidence that petitioner did not explain the use of two names, first to the Examiners and then to the Naturalization Court. The circumstances proved indicate that explanations were in fact made. 29

We review the cases cited by Judge La Buy on the matter of the use of an assumed name in order to show that they are not in point. ..... 32

The findings concerning use of name are entitled to no weight because Judge La Buy misconceived the law applicable. ..... 32

We quote from a case to show the law applicable in the matter of securing a visa relative to representations. ..... 41

The Government proved a case for petitioner while attempting to prove its case. ..... 42

The Examiners who testified did not remember petitioner or the transaction. The Government attempted to prove a false answer as to arrests by certain markings on the papers coupled with proof of custom. This proof was insufficient to warrant the inference drawn here by the Attorneys for the Government. ..... 42

We show that the courts below drew unwarranted inferences from proof of so-called custom. ..... 43

The Government undertook to prove that petitioner deceived the Examiners and consequently they recommended citizenship. The proof failed. There was no evidence from which to conclude that the Naturalization Judge considered anything submitted by the Examiners. ..... 45

We quote from the opinion to show that Judge La Buy relied upon custom. We quote a rule of law to be applied when a judge makes a finding where the evidence indicates the contrary. ..... 50

The refusal of the Court of Appeals to reject the findings based upon custom creates a confusing conflict of opinion. ..... 52

The Court of Appeals misconstrued one of our propositions and consequently failed to pass upon our claim that it was error to give the evidence of custom probative value— ..... 53

The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable. .... 54

We reply to the notation about concealment of a criminal record. Our opponents blow hot and cold in concluding that meant by Judge La Buy. When it suits them, they claim that Judge La Buy merely mentioned a proposition but did not make use of it. On the other hand, where Judge La Buy has merely announced a rule of law without application of it, our opponents proceed to apply it for the court. ..... 56

In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below. ..... 56

The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed admonishments of this Honorable Court. ..... 57

Petitioner demurred to the evidence. Your Honors need not be concerned with credibility. There being several inferences deductible from the facts the Government has not maintained the proposition upon which plaintiff would be entitled to a decree— ..... 58

The order of naturalization entered in 1928 is *res judicata*. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree. ..... 59

Our opponents have erected a man of straw. We did not claim that Congress had no power to provide for the revocation of citizenship by misrepresentation, and concealment of material facts, provided the statute is properly construed and applied. We reply to that said by the Attorneys for the Government concerning our use of the *Knauer* case. ..... 60

We set out some of our reasons for presenting this reply brief and endeavor to explain how it seemed necessary to go into such detail concerning the record and the points urged. ..... 61

We set out examples from the Brief in Opposition to show that our opponents have fuzzed up the issues. .... 62

We repeat some questions left unanswered by our opponents as follows:

"(a) What concealments were made?

(b) What misrepresentations were made?

(c) To whom were they made?

(d) How did their making result in the entry of the order of naturalization?"

..... 65

We argue concerning the value of the judgment of the Naturalization Court and assert that the courts below erred in not accepting it as against the evidence produced. ..... 66

We quote from the complaint and argue that Your Honors should disregard the findings made in contradiction of the record made when petitioner was admitted. ..... 67

Without the testimony of Examiner McKay or some one who knew what was done by Mr. McKay the Government had no case on its own theory. ..... 68

Examiner Jordan gave no testimony from which it could be inferred that he had been deceived. ..... 69

Examiner Jordan did not remember the person. The United States Attorneys did not ask him if he had talked to petitioner or if he had examined any report made by Mr. McKay or any other papers or records.

This line of questioning was not followed up, no doubt because Mr. Jordan said he knew only that which he read on the form called a Face Brief. That amounts to nothing. ..... 69

We point to deficiencies in the proof concerning that said to the Examiners. ..... 70

We quote from a case dealing with the statute relating to a situation where the findings of the Examiner are of no consequence. We have such a case at bar. .. 72

We copy the order of court admitting petitioner which order has not been given the attention it merits. 75

We reply to the attack made by our opponents on the manner in which we argued in our opening brief. .. 77

Mr. Jordan had been with the Naturalization Service since 1912. No doubt he knew very well that there was no custom or regular procedure followed, the same in every case. He must have known that the prosecutor was trying to get him to read meaning into the check marks and other notations not warranted by the facts. Your Honors will perceive that he practically said so if his deposition is studied. ..... 79

We reply to the assertion by our opponents that the evidence is clear, unequivocal and convincing. ..... 80

The value of the constitutional privilege was destroyed. De Lucia was penalized for reliance upon his privilege. When the Court of Appeals perceived that the District Court had erred and reversed the contempt case, the Appeals Court should have perceived that the error also made mandatory the reversal of the decree in the case at bar. ..... 81

We point to the manner in which our opponents seek to water down our question concerning the abuse of the Federal Rules of Civil Procedure below. ..... 82

We show from the record that Judge La Buy did throw into the scale the fact that petitioner claimed privilege at pre-trial. ..... 82

We quote from that said by former Justices of this Honorable Court concerning the Fifth Amendment. ... 83

We examine some of the record in detail to show that Judge LaBuy did throw the pre-trial incident into the scale in making inferences from the evidence and lack of proof. ..... 84

We quote from the opinions below concerning failure to testify and reply to our opponents who assert that they find ample support. ..... 85

We quote from the opinion of the Court of Appeals in the contempt case and point to the deficiencies in the reasons given for reversal. ..... 86

We argue that the District Court erred in reliance on the *Costello* case and point to the danger of allowing the opinions below to stand as encouragement for other prosecutors, in any desire to strip citizens of constitutional rights in denaturalization cases. ..... 87

It is reasonable to conclude that if, when he filed his complaint, the prosecutor was in a position to prove his case, without compelling petitioner to become a witness against himself, the prosecutor would not have resorted to all of this pre-trial procedure. If the maker of the good cause affidavit had been truthful, he would have said that he was suspicious of petitioner and hoped to be able to later build a case against him. Good cause to institute a suit can not exist in the absence of evidence to prove the charge. ..... 88

We quote from a late case in order to illustrate the tendency of some prosecutors to abuse their power in the matter of interrogation of citizens. ..... 89

We respectfully submit that in order to safeguard the constitutional rights of citizens it is not only necessary for this Honorable Court to remind prosecutors and some judges of these rights, but Your Honors should, in the interest of the administration of justice, apply the principles to situations created by new methods of abuse. In the words of Chief Justice Warren, Your Honors should "apply to ever changing conditions the never changing principles of freedom". .... 90

The denial of certiorari here will no doubt leave the opinion of Judge La Buy and of the Court of Appeals as authority for the prosecutor to first file his complaint and to then seek his proof from the mouth of the defendant. A defendant refusing will not only be punished with a contempt sentence, including jail, but the fact of refusal will be regarded as enough to convert a weak case into a one of clear convincing proof. 90

We comb over the record in order to determine, if posisble, what may have influenced Judge La Buy and argue that the District Court leaned heavily on the refusal of petitioner to testify at pretrial, in order to bolster up the case for the Government. ..... 91

We quote from opinions of this Honorable Court on the subject of constitutional rights. ..... 97

We point to the danger encountered when courts fail to distinguish between a denaturalization case and cases involving aliens. ..... 99

We reply to the argument made by our opponents that the matter of the abuse of Federal Rules is not properly before this Honorable Court. ..... 100

The Court of Appeals erred in approving the application of a sanction by the District Court because of failure to testify. ..... 101

We analyze the cases cited by Judge La Buy to show that the Trial Judge was misguided concerning the rule announced in reference to silence. ..... 102

## XXI.

### Conclusion

To borrow from the language of eminent counsel in *Peirce* v. *New Hampshire*, 46 U.S. 504, 563, we conclude by saying that instead of receiving, as he was entitled to, the protection of the government, his constitutional rights have been trampled upon. Petitioner has, in the last resort appealed to this tribunal for redress, in the hope that here at least the law may be administered, right defended and justice maintained uncontaminated by the breath of temporary diseased sentiment, which in its misguided and abortive attempts at reform essays to eradicate evil by making use of tax laws, Congressional hearings, and laws of immigration in order to harass individuals placed by the authorities on some sort of list. We leave this case in the hands of Your Honors confident that petitioner, in common with all the other citizens of this whole country, will ever find in this Honorable Court a full and ample protection for his constitutional rights, against which the waves of fanaticism, as well as faction, may beat harmlessly.

Respectfully submitted,

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